

**OFFICIAL CODE
OF
GEORGIA**

ANNOTATED



VOLUME 14B

Title 16. Crimes and Offenses

Chapters 12-17

2011 Edition



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OFFICIAL CODE OF GEORGIA ANNOTATED

With Provision for Subsequent Pocket Parts

Prepared by

The Code Revision Commission
The Office of Legislative Counsel
and
The Editorial Staff of LexisNexis®



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Volume 14B **2011 Edition**

Title 16. Crimes and Offenses
Chapters 12-17

Including Acts of the 2011 Session of the General Assembly of Georgia
and Annotations taken from the Georgia Reports
and the Georgia Appeals Reports

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OFFICE OF SECRETARY OF STATE

I, Brian P. Kemp, Secretary of State of the State of Georgia, do hereby certify that

the statutory portion of the Official Code of Georgia Annotated contained in this volume is a true and correct copy of such material as enacted by the General Assembly of Georgia; all as same appear of file and record in this office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of my office, at the Capitol, in the City of Atlanta, this 15th day of July, in the year of our Lord Two Thousand and Eleven and of the Independence of the United States of America the Two Hundred and Thirty-Sixth.



B. P. Kemp

Brian P. Kemp, Secretary of State

Preface

Volumes 14, 14A, and 14B cumulate and replace the 2007 editions of Volumes 14 and 14A of the Official Code of Georgia Annotated, as supplemented by the 2010 Cumulative Supplement. The 2007 Volumes 14 and 14A and their 2010 Supplements may be recycled or, if so desired, retained for historical purposes.

This volume contains all laws specifically codified in Title 16 (Chapters 12-17) by the General Assembly through the 2011 Session. This volume also contains case annotations reflecting decisions posted to LexisNexis® through April 22, 2011. These annotations will appear in the following traditional reporter sources: Georgia Supreme Court Opinions; Georgia Appeals Court Opinions; Southeastern Reporter, Second Series; Supreme Court Reporter; Federal Reporter, Third Series; Federal Supplement, Second Series; Federal Rules Decisions; and Bankruptcy Reporter. As official and traditional citations become available, substitutions for the LexisNexis® citations will be made.

Additionally, LexisNexis® has prepared annotations and references to Attorney General Opinions, law reviews, and other research sources that we hope will be beneficial as you utilize this product. A complete listing of those sources is as follows: Official and Unofficial Attorney General Opinions; Opinions of the Judicial Qualifications Commission; Advisory Opinions of the State Disciplinary Board of the State Bar; Formal Advisory Opinions of the State Disciplinary Board of the State Bar, issued by the Supreme Court of Georgia; Emory Law Journal; Georgia Law Review; Georgia State University Law Review; Mercer Law Review; Georgia State Bar Journal; American Law Reports; American Jurisprudence 2d; American Jurisprudence Pleading and Practice, American Jurisprudence Proof of Facts; American Jurisprudence Trials; Corpus Juris Secundum; and Uniform Laws Annotated. Also included, where appropriate, are cross references to the Official Code of Georgia Annotated.

This volume retains amendment notes and effective date notes for Acts passed during the 2009, 2010, and 2011 Sessions of the General Assembly. In order to determine the changes which were made or the effective date applied to a Code section by an Act passed prior to the 2009 Session of the General Assembly, the user should consult the Georgia Laws.

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User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the Official Code of Georgia Annotated, a User's Guide containing comments and information on the many features found within the Code has been included in Volume 1 of the Official Code of Georgia Annotated.

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Cross references. — Disfranchisement of persons for conviction of felony involving moral turpitude, Ga. Const. 1983, Art. II, Sec. I, Para. III and § 21-2-216. Applicability of title to financial institutions and their directors, officers, and others, § 7-1-841. Offenses giving rise to cancellation, suspension, or revocation of drivers' licenses, § 40-5-50 et seq.

Editor's notes. — Judicial decisions, attorney general opinions, and cross reference notes in this bound volume which cite to Code sections in Title 24 refer to provisions of such title as it existed prior to the January 1, 2013, effective date of Ga. L. 2011, p. 99. See the Table of Comparable Provisions at the beginning of the version of Title 24 which becomes effective on January 1, 2013.

Law reviews. — For article discussing history of criminal law in Georgia, and some of the problems facing the criminal law study commission created in 1961, see 15 Mercer L. Rev. 399 (1964). For article advocating the adoption of the proposed Criminal Code of 1968, see 3 Ga. St. B.J. 145 (1966). For article discussing the 1968 Criminal Code of Georgia, comparing pre-existing provisions of Georgia criminal law, see 5 Ga. St. B.J. 185 (1968). For article discussing developments in Georgia criminal law in 1976 to 1977, see 29 Mercer L. Rev. 55 (1977). For article, "Toward a Perspective on the Death Penalty Cases," see 27 Emory L.J. 469 (1978). For

article surveying cases dealing with criminal law and criminal procedure from June 1, 1977 through May 1978, see 30 Mercer L. Rev. 27 (1978). For article surveying judicial developments in Georgia Criminal Law, see 31 Mercer L. Rev. 59 (1979). For annual survey of criminal law and procedure, see 35 Mercer L. Rev. 103 (1983). For article surveying criminal law and procedure in 1984-1985, see 37 Mercer L. Rev. 179 (1985). For annual survey of criminal law and procedure, see 39 Mercer L. Rev. 127 (1987). For annual survey of criminal law and procedure, see 40 Mercer L. Rev. 153 (1988). For annual survey on criminal law and procedure, see 42 Mercer L. Rev. 141 (1990). For annual survey of criminal law and procedure, see 43 Mercer L. Rev. 175 (1991). For annual survey on criminal law and procedure, see 44 Mercer L. Rev. 165 (1992). For annual survey article on criminal law and procedure, see 45 Mercer L. Rev. 135 (1993). For annual survey article on criminal law and procedure, see 46 Mercer L. Rev. 153 (1994). For annual survey article on criminal law and procedure, see 48 Mercer L. Rev. 219 (1996). For annual survey article discussing developments in criminal law, see 51 Mercer L. Rev. 209 (1999). For annual survey article discussing developments in criminal law, see 52 Mercer L. Rev. 167 (2000). For annual survey of labor and employment law, see 58 Mercer L. Rev. 211 (2006).

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Am. Jur. Trials. — Investigating Particular Crimes, 2 Am. Jur. Trials 171.

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Law reviews. — For note, “Rabbit Hunting in the Supreme Court: The Constitutionality of State Prohibitions of Sex

Toy Sales Following Lawrence v. Texas,” see 44 Ga. L. Rev. 245 (2009).

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Cross references. — Restriction on operation of bathhouses, § 31-12-11. Penalty for maintenance of nuisance tending to injure health of citizens or corrupt public morals, § 41-1-6. Occupying rooms in roadhouses or similar establishments for immoral purposes, false registration in such establishments, § 43-21-61.

Law reviews. — For article, “Misdemeanor Sentencing in Georgia,” see 7 Ga. St. B.J. 8 (2001). For article, “New Challenges for the Georgia General Assembly: Survey of Child Endangerment Statutes,” see 7 Ga. St. B.J. 8 (2001).

16-12-1. Contributing to the delinquency, unruliness, or deprivation of a minor.

(a) As used in this Code section, the term:

(1) “Delinquent act” means a delinquent act as defined in Code Section 15-11-2.

(2) “Felony” means any act which constitutes a felony under the laws of this state, the laws of any other state of the United States, or the laws of the United States.

(3) “Minor” means any individual who is under the age of 17 years or any individual under the age of 18 years who is alleged to be a deprived child or an unruly child as such terms are defined in Code Section 15-11-2.

(4) “Serious injury” means an injury involving a broken bone, the loss of a member of the body, the loss of use of a member of the body, the substantial disfigurement of the body or of a member of the body, an injury which is life threatening, or any sexual abuse of a child under 16 years of age by means of an act described in subparagraph (a)(4)(A), (a)(4)(G), or (a)(4)(I) of Code Section 16-12-100.

(5) “Service provider” means an entity that is registered with the Department of Human Services pursuant to Article 7 of Chapter 5 of Title 49 or a child welfare agency as defined in Code Section 49-5-12 or agent or employee acting on behalf of such entity or child welfare agency.

(b) A person commits the offense of contributing to the delinquency, unruliness, or deprivation of a minor when such person:

(1) Knowingly and willfully encourages, causes, abets, connives, or aids a minor in committing a delinquent act;

(2) Knowingly and willfully encourages, causes, abets, connives, or aids a minor in committing an act which would cause such minor to be found to be an unruly child as such is defined in Code Section 15-11-2; provided, however, that this paragraph shall not apply to a service provider that notifies the minor’s parent, guardian, or legal custodian of the minor’s location and general state of well being as soon as possible but not later than 72 hours after the minor’s acceptance of services; provided, further, that such notification shall not be required if:

(A) The service provider has reasonable cause to believe that the minor has been abused or neglected and makes a child abuse report pursuant to Code Section 19-7-5;

(B) The minor will not disclose the name of the minor’s parent, guardian, or legal custodian, and the Division of Family and Children Services within the Department of Human Services is notified within 72 hours of the minor’s acceptance of services; or

(C) The minor’s parent, guardian, or legal custodian cannot be reached, and the Division of Family and Children Services within the Department of Human Services is notified within 72 hours of the minor’s acceptance of services;

(3) Willfully commits an act or acts or willfully fails to act when such act or omission would cause a minor to be found to be a deprived child as such is defined in Code Section 15-11-2;

(4) Knowingly and willfully hires, solicits, engages, contracts with, conspires with, encourages, abets, or directs any minor to commit any felony which encompasses force or violence as an element of the offense or delinquent act which would constitute a felony which encompasses force or violence as an element of the offense if committed by an adult;

(5) Knowingly and willfully provides to a minor any weapon as defined in paragraph (2) of subsection (a) of Code Section 16-11-127.1 or any weapon as defined in Code Section 16-11-121 to commit any felony which encompasses force or violence as an element of the offense or delinquent act which would constitute a felony which encompasses force or violence as an element of the offense if committed by an adult; or

(6) Knowingly and willfully hires, solicits, engages, contracts with, conspires with, encourages, abets, or directs any minor to commit any smash and grab burglary which would constitute a felony if committed by an adult.

(c) It shall not be a defense to the offense provided for in this Code section that the minor has not been formally adjudged to have committed a delinquent act or has not been found to be unruly or deprived.

(d) A person convicted pursuant to paragraph (1) or (2) of subsection (b) of this Code section shall be punished as follows:

(1) Upon conviction of the first or second offense, the defendant shall be guilty of a misdemeanor and shall be fined not more than \$1,000.00 or shall be imprisoned for not more than 12 months, or both fined and imprisoned; and

(2) Upon the conviction of the third or subsequent offense, the defendant shall be guilty of a felony and shall be fined not less than \$1,000.00 nor more than \$5,000.00 or shall be imprisoned for not less than one year nor more than three years, or both fined and imprisoned.

(d.1) A person convicted pursuant to paragraph (3) of subsection (b) of this Code section shall be punished as follows:

(1) Upon conviction of an offense which resulted in the serious injury or death of a child, without regard to whether such offense was a first, second, third, or subsequent offense, the defendant shall be guilty of a felony and shall be punished as provided in subsection (e) of this Code section;

(2) Upon conviction of an offense which does not result in the serious injury or death of a child and which is the first conviction, the defendant shall be guilty of a misdemeanor and shall be fined not more than \$1,000.00 or shall be imprisoned for not more than 12 months, or both fined and imprisoned;

(3) Upon conviction of an offense which does not result in the serious injury or death of a child and which is the second conviction, the defendant shall be guilty of a high and aggravated misdemeanor and shall be fined not less than \$1,000.00 nor more than \$5,000.00 or shall be imprisoned for not less than one year, or both fined and imprisoned; and

(4) Upon the conviction of an offense which does not result in the serious injury or death of a child and which is the third or subsequent conviction, the defendant shall be guilty of a felony and shall be fined not less than \$10,000.00 or shall be imprisoned for not less than one year nor more than five years, or both fined and imprisoned.

(e) A person convicted pursuant to paragraph (4), (5), or (6) of subsection (b) or paragraph (1) of subsection (d.1) of this Code section shall be guilty of a felony and punished as follows:

(1) Upon conviction of the first offense, the defendant shall be imprisoned for not less than one nor more than ten years; and

(2) Upon conviction of the second or subsequent offense, the defendant shall be imprisoned for not less than three years nor more than 20 years. (Ga. L. 1953, Nov.-Dec. Sess., p. 321, § 1; Ga. L. 1982, p. 968, § 1; Ga. L. 1994, p. 1158, § 1; Ga. L. 1995, p. 10, § 16; Ga. L. 1996, p. 273, § 1; Ga. L. 1999, p. 232, § 1; Ga. L. 2004, p. 57, § 5; Ga. L. 2010, p. 1147, § 7/HB 1104; Ga. L. 2011, p. 470, § 3/SB 94.)

The 2010 amendment, effective July 1, 2010, deleted “or” at the end of paragraph (b)(4); substituted “; or” for a period at the end of paragraph (b)(5); added paragraph (b)(6); in the introductory language of subsection (e), substituted “paragraph (4), (5), or (6)” for “paragraph (4) or (5)”; and, in paragraph (e)(1), substituted “ten years” for “five years”.

The 2011 amendment, effective July 1, 2011, in paragraph (a)(3), inserted “or an unruly child”, substituted “such terms are defined” for “such is defined”, and deleted “, relating to juvenile proceedings” following “Section 15-11-2” at the end; added paragraph (a)(5); deleted “as such is defined in Code Section 15-11-2, relating to juvenile proceedings” following “act”

from the end of paragraph (b)(1); in paragraph (b)(2), deleted “, relating to juvenile proceedings” following “Section 15-11-2” and added the proviso in the introductory language; added subparagraphs (b)(2)(A) through (b)(2)(C); and deleted “, relating to juvenile proceedings” following “Section 15-11-2” from the end of paragraph (b)(3).

Cross references. — Sale or purchase of alcoholic beverages to, by, or for underage persons, § 3-3-23 et seq. Disposition by juvenile court of deprived, delinquent, or unruly child, § 15-11-34 et seq.

Editor’s notes. — Ga. L. 1996, p. 273, § 3, not codified by the General Assembly, provides for severability.

Ga. L. 2004, p. 57, § 6, not codified by the General Assembly, provides that the

amendment by that Act shall apply to all crimes which occur on or after July 1, 2004.

Ga. L. 2011, p. 470, § 1, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Runaway Youth Safety Act.'"

Law reviews. — For article, "Criminal Law," see 53 Mercer L. Rev. 209 (2001). For article on 2004 amendment of this

Code section, see 21 Georgia St. U.L. Rev. 45 (2004).

For note on the 1994 amendment of this Code section, see 11 Georgia St. U.L. Rev. 117 (1994). For review of 1996 offenses against public health and morals legislation, see 13 Georgia St. U.L. Rev. 116 (1996). For note on 1999 amendment to this Code section, see 16 Georgia St. U.L. Rev. 81 (1999).

JUDICIAL DECISIONS

Editor's notes. — Many of the cases noted below were decided prior to the 1994 amendment of subsection (d).

Statute is not unconstitutionally vague. — O.C.G.A. § 16-12-1(b)(2), even strictly construed, provided adequate notice to a person of common understanding that leaving a three-year-old child with a violent third party who had previously beaten the child and who was under the influence of methamphetamine and then locking the child in a bathroom instead of promptly seeking medical attention for the multiple skull fractures inflicted on the child by the third party was prohibited conduct. *Bagby v. State*, 274 Ga. 222, 552 S.E.2d 807 (2001).

Term "knowingly" required the state to prove that defendant knew the minor was under the age of 17 years. *Brown v. State*, 233 Ga. App. 195, 504 S.E.2d 35 (1998).

Accusation under provisions making it a misdemeanor to do any act which the defendant knew or should have known would produce, promote, or contribute to conditions rendering a child delinquent or neglected must allege that the child is delinquent or neglected. *Walker v. State*, 104 Ga. App. 595, 122 S.E.2d 486 (1961).

To constitute a valid indictment, it is necessary to allege that accused has so acted and affected a delinquent or neglected child or children. *Dabney v. State*, 143 Ga. App. 655, 239 S.E.2d 698 (1977).

Proof of delinquency required. — Even though, under O.C.G.A. § 16-12-1(b)(1), the state was not required to show that the minor was formally adjudicated delinquent, it was required to allege and prove that the victims

had committed delinquent acts. *Schlomer v. State*, 247 Ga. App. 257, 543 S.E.2d 472 (2000).

When a child is neglected. — Child may be neglected either when the child is not provided with necessities or where by reason of parents' improvidence and neglect the child is placed in unfit surroundings or exposed to unfit, immoral, and depraved influences, not conducive to the child's health, morals or well-being. *Walker v. State*, 104 Ga. App. 595, 122 S.E.2d 486 (1961).

Evidence held sufficient for conviction. — See *Eckman v. State*, 201 Ga. App. 879, 413 S.E.2d 221 (1991); *Bazin v. State*, 299 Ga. App. 875, 683 S.E.2d 917 (2009).

Evidence that while in defendants' care a child suffered a fractured arm for which defendants refused to seek medical treatment and were evasive about explaining, although circumstantial, was sufficient to support convictions for child cruelty and contributing to the deprivation of a minor. *Thompson v. State*, 262 Ga. App. 17, 585 S.E.2d 125 (2003).

Given evidence that the defendant's two young children were left unattended, resulting in one going outside in near freezing weather without the proper clothing, causing that child's body temperature to drop two degrees and suffer mild hypothermia, the defendant's two convictions for contributing to the deprivation of a minor were upheld on appeal. *Ellis v. State*, 283 Ga. App. 808, 642 S.E.2d 869 (2007).

There was sufficient evidence to support the defendant's conviction of contributing to the delinquency of a minor where there was evidence that the defendant knew

that juveniles were drinking alcohol at a party held at the defendant's house by the defendant's child. It was not necessary that the defendant personally furnish the alcohol, and the jury was not required to accept the defendant's story that the defendant denied permission for the party and slept without being aware that the party was going on. *Beckom v. State*, 286 Ga. App. 38, 648 S.E.2d 656 (2007).

Testimony of two 14-year-old victims that the defendant provided the victims with alcohol and illegal drugs, corroborated by the testimony of two other witnesses, sufficed to sustain the defendant's convictions of two counts of contributing to the delinquency of a minor in violation of O.C.G.A. § 16-12-1(b)(1). *Hill v. State*, 295 Ga. App. 360, 671 S.E.2d 853 (2008).

Delinquency of a minor is not lesser included offense of child molestation. — After the defendant allegedly had intercourse with a 14-year-old, the trial court did not err in failing to give a lesser included offense instruction regarding delinquency of a minor in violation of O.C.G.A. § 16-12-1(b)(1) in addition to the court's instructions on child molestation in violation of O.C.G.A. § 16-6-4(a). Delinquency of a minor was not a lesser included offense of child molestation as proof of one offense would not have served to prevent a conviction on the other pursuant to O.C.G.A. § 16-1-6 because the offenses shared no essential elements and were directed to different acts. *Slack v. State*, 265 Ga. App. 306, 593 S.E.2d 664 (2004).

Improper punishment. — In sentencing defendant on conviction of two counts of endangering a child, the court erred in imposing sentences of 12 months on the first count, consecutive to defendant's 12-month sentence for driving under the influence, and, on the second count, 12 months' probation consecutive to the sentence on the first count. *Guest v. State*, 229 Ga. App. 627, 494 S.E.2d 523 (1998).

Sentence appropriate. — There was no showing that the defendant's sentences for enticing a minor for indecent purposes, statutory rape, and contributing to the delinquency of a minor were vindictively enhanced in violation of Ga. Unif. Super. Ct. R. 33.6(B) after the defendant was

allowed to revoke a guilty plea because, *inter alia*, the trial judge found that an enhanced sentence was warranted based on material differences between the facts presented regarding the nature of the crimes during the plea hearing and the trial; the concurrent sentences of 15 years to serve for enticing a minor for indecent purposes and statutory rape, plus 12 concurrent months for contributing to the delinquency of a minor were within statutory limits and valid. There was no absolute constitutional bar to imposing a more severe sentence upon re-sentencing. *Hawes v. State*, 298 Ga. App. 461, 680 S.E.2d 513 (2009), cert. denied, No. S09C1769, 2010 Ga. LEXIS 15 (Ga. 2010).

Merger with DUI conviction prohibited. — Despite the defendant's contrary contention, the trial court did not err in failing to merge a DUI conviction with a conviction for endangering a child by DUI, for the purposes of prosecution and sentence, as O.C.G.A. § 40-6-391(l) specifically prohibited merger, and O.C.G.A. § 16-12-1(d) provided independent provisions for punishment. *Slayton v. State*, 281 Ga. App. 650, 637 S.E.2d 67 (2006).

Rule of lenity did not apply to multiple convictions. — In a criminal trial on charges that the defendant allowed the repeated rapes of the defendant's 11-year-old child, the rule of lenity did not require that the defendant's felony convictions for being a party to rape and cruelty to children should be subsumed by the misdemeanor conviction for contributing to the deprivation of children because different facts were necessary to prove the offenses; the rape conviction required proof under O.C.G.A. §§ 16-2-20 and 16-6-1(a)(1) that the defendant took affirmative steps to aid the rapist, the cruelty to children conviction required proof under O.C.G.A. § 16-5-70(b) that the defendant caused excessive mental pain to the child, and the conviction for contributing to the deprivation of a minor required proof under O.C.G.A. §§ 15-11-2(8)(A) and 16-12-1(b)(3) that the defendant failed to provide the child with proper care necessary for the child's health, which the state proved by showing that the defendant failed to seek prenatal care for the child even though the defendant knew

that the child was pregnant. *Johnson v. State*, 283 Ga. App. 99, 640 S.E.2d 644 (2006).

Cited in *Dunn v. State*, 102 Ga. App. 473, 116 S.E.2d 897 (1960); *Bullock v.*

State, 121 Ga. App. 700, 175 S.E.2d 163 (1970); *Dye v. State*, 159 Ga. App. 494, 283 S.E.2d 708 (1981); *Monahan v. State*, 292 Ga. App. 655, 665 S.E.2d 387 (2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 47 Am. Jur. 2d, Juvenile Courts and Delinquent and Dependent Children, §§ 20, 41, 47.

C.J.S. — 43 C.J.S., Infants, §§ 118, 119.

ALR. — Acts in connection with marriage of infant below marriageable age as contributing to delinquency, 68 ALR2d 745.

Criminal liability for contributing to de-

linquency of minor as affected by the fact that minor has not become a delinquent, 18 ALR3d 824.

Mens rea or guilty intent as necessary element of offense of contributing to delinquency or dependency of minor, 31 ALR3d 848.

Giving, selling, or prescribing dangerous drugs as contributing to the delinquency of a minor, 36 ALR3d 1292.

16-12-1.1. Child, family, or group-care facility operators prohibited from employing or allowing to reside or be domiciled persons with certain past criminal violations.

(a) As used in this Code section the term:

(1) “Facility” means any day-care center, family day-care home, group-care facility, group day-care home, or similar facility at which any child who is not a member of an operator’s family is received for pay for supervision and care, without transfer of legal custody, for fewer than 24 hours per day.

(2) “Operator” means any person who applies for or holds a permit or license to operate a facility.

(b) It shall be unlawful for any operator of a facility to knowingly have any person reside at, be domiciled at, or be employed at any such facility if such person has been convicted of or has entered a plea of guilty or nolo contendere to or has been adjudicated a delinquent for:

(1) A violation of Code Section 16-4-1, relating to criminal attempt, when the crime attempted is any of the crimes specified in paragraphs (2) through (10) of this subsection;

(2) A violation of Code Section 16-5-23.1, relating to battery, when the victim at the time of such offense was a minor;

(3) A violation of any provision of Chapter 6 of this title, relating to sexual offenses, when the victim at the time of such offense was a minor;

(4) A violation of Code Section 16-12-1, relating to contributing to the delinquency of a minor;

- (5) A violation of Code Section 16-5-1, relating to murder;
- (6) A violation of Code Section 16-5-2, relating to voluntary manslaughter;
- (7) A violation of Code Section 16-6-2, relating to aggravated sodomy;
- (8) A violation of Code Section 16-6-3, relating to rape;
- (9) A violation of Code Section 16-6-22.2, relating to aggravated sexual battery; or
- (10) A violation of Code Section 16-8-41, relating to armed robbery, if committed with a firearm.

(c) Any person violating subsection (b) of this Code section shall be guilty of a misdemeanor. (Code 1981, § 16-12-1.1, enacted by Ga. L. 1997, p. 713, § 1.)

Cross references. — Community Services for the Mentally Retarded, T. 37, C. 5. Day-Care Centers for the Mentally Retarded, T. 37, C. 6.

Law reviews. — For article commenting on the enactment of this Code section, see 14 Georgia St. U.L. Rev. 76 (1997).

16-12-2. Smoking in public places.

(a) A person smoking tobacco in violation of Chapter 12A of Title 31 shall be guilty of a misdemeanor and, if convicted, shall be punished by a fine of not less than \$100.00 nor more than \$500.00.

(b) This Code section shall be cumulative to and shall not prohibit the enactment of any other general and local laws, rules and regulations of state or local agencies, and local ordinances prohibiting smoking which are more restrictive than this Code section. (Code 1933, § 26-9910, enacted by Ga. L. 1975, p. 45, § 1; Ga. L. 1982, p. 3, § 16; Ga. L. 1994, p. 650, § 3; Ga. L. 2005, p. 60, § 16/HB 95; Ga. L. 2005, p. 1184, § 1/SB 90.)

Cross references. — Master settlement agreement on tobacco, § 10-13-1 et seq.

Code Commission notes. — The amendment of this Code section by Ga. L. 2005, p. 60, § 16(7), irreconcilably conflicted with and was treated as superseded by Ga. L. 2005, p. 1184, § 1. See

County of Butts v. Strahan, 151 Ga. 417 (1921).

Law reviews. — For article, “Misdemeanor Sentencing in Georgia,” see 7 Ga. St. B.J. 8 (2001).

For note on the 1994 amendment of this Code section, see 11 Georgia St. U.L. Rev. 126 (1994).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required for violators. — O.C.G.A. § 16-12-2 is an offense for which those charged with a violation

are to be fingerprinted. 2006 Op. Att’y Gen. No. 2006-2.

RESEARCH REFERENCES

ALR. — Constitutionality of anti-cigarette legislation, 20 ALR 926.
Validity, construction, and application of nonsmoking regulations, 65 ALR4th 1205.

Secondary smoke as battery, 46 ALR5th 813.

16-12-3. Suspension of gas or electrical service for not making payments on appliances purchased from or repaired by utility company.

(a) It shall be unlawful for any gas or electric utility company or electric membership corporation to cut off or suspend gas or electric service in any residence because the resident has failed to pay for or has failed to make timely payments for any appliance purchased from or any appliance repaired by such company or corporation. Payments received from a resident shall be first applied to the service, unless otherwise specified by the resident at the time of payment.

(b) Any company or corporation or any agent or employee thereof acting within the scope of his authority knowingly violating subsection (a) of this Code section shall be guilty of a misdemeanor. (Ga. L. 1975, p. 849, § 1.)

Cross references. — Sales of goods or services under retail installments con-

tracts, § 10-1-1 et seq. Maintenance or operation of bucket shop, § 13-9-6.

RESEARCH REFERENCES

ALR. — Duty of public utility to notify patron in advance of temporary suspension of service, 52 ALR 1078.

Duty of gas company as regards precautions to be taken upon or after discontinuing service to premises, 13 ALR2d 1396.

Right of public utility to deny service at one address because of failure to pay for past service rendered at another, 73 ALR3d 1292.

16-12-4. Cruelty to animals.

(a) As used in this Code section, the term:

(1) “Animal” shall not include any fish nor shall such term include any pest that might be exterminated or removed from a business, residence, or other structure.

(2) "Conviction" shall include pleas of guilty or nolo contendere or probation as a first offender pursuant to Article 3 of Chapter 8 of Title 42 and any conviction, plea of guilty or nolo contendere, or probation as a first offender for an offense under the laws of the United States or any of the several states that would constitute a violation of this Code section if committed in this state.

(3) "Willful neglect" means the intentional withholding of food and water required by an animal to prevent starvation or dehydration.

(b) A person commits the offense of cruelty to animals when he or she causes death or unjustifiable physical pain or suffering to any animal by an act, an omission, or willful neglect. Any person convicted of a violation of this subsection shall be guilty of a misdemeanor; provided, however, that:

(1) Any person who is convicted of a second or subsequent violation of this subsection shall be punished by imprisonment not to exceed 12 months, a fine not to exceed \$5,000.00, or both; and

(2) Any person who is convicted of a second or subsequent violation of this subsection which results in the death of an animal shall be guilty of a misdemeanor of a high and aggravated nature and shall be punished by imprisonment for not less than three months nor more than 12 months, a fine not to exceed \$10,000.00, or both, which punishment shall not be suspended, probated, or withheld.

(c) A person commits the offense of aggravated cruelty to animals when he or she knowingly and maliciously causes death or physical harm to an animal by rendering a part of such animal's body useless or by seriously disfiguring such animal. A person convicted of the offense of aggravated cruelty to animals shall be punished by imprisonment for not less than one nor more than five years, a fine not to exceed \$15,000.00, or both, provided that any person who is convicted of a second or subsequent violation of this subsection shall be punished by imprisonment for not less than one nor more than five years, a fine not to exceed the amount provided by Code Section 17-10-8, or both.

(d) Before sentencing a defendant for any conviction under this Code section, the sentencing judge may require psychological evaluation of the offender and shall consider the entire criminal record of the offender.

(e) The provisions of this Code section shall not be construed as prohibiting conduct which is otherwise permitted under the laws of this state or of the United States, including, but not limited to, agricultural, animal husbandry, butchering, food processing, marketing, scientific, research, medical, zoological, exhibition, competitive, hunting, trapping, fishing, wildlife management, or pest control practices or the

authorized practice of veterinary medicine nor to limit in any way the authority or duty of the Department of Agriculture, Department of Natural Resources, any county board of health, any law enforcement officer, dog, animal, or rabies control officer, humane society, veterinarian, or private landowner protecting his or her property.

(f)(1) Nothing in this Code section shall be construed as prohibiting a person from:

(A) Defending his or her person or property, or the person or property of another, from injury or damage being caused by an animal; or

(B) Injuring or killing an animal reasonably believed to constitute a threat for injury or damage to any property, livestock, or poultry.

(2) The method used to injure or kill such animal shall be designed to be as humane as is possible under the circumstances. A person who humanely injures or kills an animal under the circumstances indicated in this subsection shall incur no civil or criminal liability for such injury or death. (Code 1933, § 26-2802, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1992, p. 1654, § 1; Ga. L. 2000, p. 754, § 12.)

Cross references. — Permitting livestock to run at large or stray, § 4-3-3. Cruelty to dogs and killing dogs, § 4-8-5. Regulation of pet dealers and operators of kennels, stables, or animal shelters, T. 4, C. 11. Abandonment of domesticated animal, § 4-11-15.1. Humane handling and care of wild animals, § 27-5-6.

Editor's notes. — Ga. L. 2000, p. 754,

§ 1, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Animal Protection Act of 2000'."

Law reviews. — For survey article on criminal law and procedure, see 34 Mercer L. Rev. 89 (1982). For article, "Misdemeanor Sentencing in Georgia," see 7 Ga. St. B.J. 8 (2001).

JUDICIAL DECISIONS

Constitutionality. — O.C.G.A. § 16-12-4 was not unconstitutionally vague; subsection (b) clearly explained when a person would be liable for cruelty to animals, while subsections (f)(1) and (2) explained that killing or wounding an animal could be justified under some circumstances if the killing was "humane," or done in such a way as to demonstrate compassion for the animal. In the Interest of C.B., 286 Ga. 173, 686 S.E.2d 124 (2009).

Dogfighting provision in § 16-12-37 constitutional. — While O.C.G.A. § 16-12-4 makes it a misdemeanor for anyone to subject any animal to cruel treatment, O.C.G.A. § 16-12-37

(§5,000.00 fine, with optional year in prison, for dogfighting) does not violate equal protection, because the legislature acted within its discretion in mandating that those who participate in a dogfight organization for sport or gaming purposes should be dealt with more harshly. Hargrove v. State, 253 Ga. 450, 321 S.E.2d 104 (1984).

O.C.G.A. § 16-12-4 does not limit offense to killing animals; it is enough to cause them unjustifiable suffering. Smith v. State, 160 Ga. App. 26, 285 S.E.2d 749 (1981).

Malice, wilfulness and intent are not elements of the offense of cruelty to animals. Miller v. State, 179 Ga. App. 217,

345 S.E.2d 909 (1986); *Cox v. State*, 216 Ga. App. 86, 453 S.E.2d 471 (1995).

Motive for inflicting injury and justification are for jury consideration.

— Motive of defendant in inflicting injury upon animal, and whether same was justifiable under circumstances, are generally questions for solution by jury. *Rushin v. State*, 154 Ga. App. 41, 267 S.E.2d 473 (1980).

Ownership of property or animals not material element. — Neither ownership of the property on which the animals are found nor ownership of the animals is a material element of the offense of cruelty to animals. *Tiller v. State*, 218 Ga. App. 418, 461 S.E.2d 572 (1995).

Test is whether injury inflicted upon animal was, under circumstances, justifiable. *Rushin v. State*, 154 Ga. App. 41, 267 S.E.2d 473 (1980).

Former Code 1933, § 26-2802 includes fowls as animals, and cruelty to a gamecock therefore is proscribed conduct. *Brackett v. State*, 142 Ga. App. 601, 236 S.E.2d 689 (1977) (see O.C.G.A. § 16-12-4).

Cockfighting is effectively prohibited by former Code 1933, § 26-2802. *Brackett v. State*, 142 Ga. App. 601, 236 S.E.2d 689 (1977) (see O.C.G.A. § 16-12-4).

Accusation sufficient. — Accusation charging a defendant with causing the unjustifiable physical pain or suffering of a dog by failing to provide adequate food or water or medical care was sufficient to charge the defendant with cruelty to animals pursuant to O.C.G.A. § 16-12-4. *Ford v. State*, 306 Ga. App. 606, 703 S.E.2d 71 (2010).

Because sufficient exigent circumstances existed to authorize a sheriff's deputy to enter the defendant's backyard and seize a number of animals the officer observed were malnourished and mistreated, and given the harsh weather conditions and impending holiday, obtaining a warrant would have been unreasonable, the defendant's motions to suppress and in limine seeking to preclude admission of the evidence seized were properly denied. Moreover, the evidence seized after the defendant's lawful arrest, and observed in plain view

by the officer upon being allowed to enter the defendant's residence was also properly admitted. *Morgan v. State*, 289 Ga. App. 209, 656 S.E.2d 857 (2008).

Facts warranting conviction under section. — When evidence shows that defendants had exclusive control and possession of certain property on which certain animals were found, and since many of the animals were dead under circumstances indicating that death resulted from lack of food and water, and since some of the animals involved were alive when found but were so seriously malnourished and ill that the animals were put to death by the state, the inescapable conclusion to be drawn from such evidence is that defendants abandoned living animals without food or water, thereby causing unjustifiable physical pain, suffering, or death. *Smith v. State*, 160 Ga. App. 26, 285 S.E.2d 749 (1981).

When cockfighting was staged on the defendant's property on which an arena and bleachers were erected, the defendant was collecting the admission fees, and gamecocks with spurs and other fighting equipment were found on the premises, the evidence was sufficient to show that the defendants were involved in the operation of organizing a cockfight and were guilty of both cruelty to animals and commercial gambling. *Morgan v. State*, 195 Ga. App. 52, 392 S.E.2d 715 (1990).

Circumstantial evidence, including testimony of witnesses who heard an injured dog yelping and howling and saw it running away, saw defendant standing with a rifle in defendant's hand, and found the dog with a gunshot wound in its ear, was sufficient to support defendant's conviction. *Willis v. State*, 201 Ga. App. 182, 410 S.E.2d 377 (1991).

When the evidence showed without question that defendant was responsible for the care and feeding of horses, necessary elements of the offense of cruelty to animals were proved by the state's establishment that the horses were neglected and were suffering. *Tiller v. State*, 218 Ga. App. 418, 461 S.E.2d 572 (1995).

Evidence was sufficient to support finding of guilt for cruelty to animals by aiding and encouraging a cock fight in violation of O.C.G.A. § 16-12-4. *Chaney v. State*, 232 Ga. App. 297, 500 S.E.2d 416 (1998).

Evidence was sufficient to support a conviction for cruelty to animals as: (1) the defendant owned 16 pit bull dogs and one boxer which were found living in defendant's backyard in 30 degree weather, with inadequate shelter, and with more than one inch of water and mud covering the yard; and (2) there was strong circumstantial evidence that defendant bred the dogs for fighting. *Stephens v. State*, 247 Ga. App. 719, 545 S.E.2d 325 (2001).

Evidence that a sheriff's deputy and a livestock inspector found cows confined without water or feed in a small pen on property defendant and defendant's spouse owned, and that the animals appeared to be suffering because they had no food or water, was sufficient to sustain defendant's conviction for violating O.C.G.A. § 16-12-4(b) even though the state did not prove willful neglect. *Cotton v. State*, 263 Ga. App. 843, 589 S.E.2d 610 (2003).

Defendant was properly convicted for arson in the second degree and cruelty to animals, where the essential elements of each of the crimes differed, and the state carried its burden of proving the distinct elements of each crime. *Motes v. State*, 189 Ga. App. 430, 375 S.E.2d 893 (1988).

Facts supporting entry of plea. — There was a sufficient factual basis under Ga. Unif. Super. Ct. R. 33.9 to support the defendant's nolo contendere plea to two counts of animal cruelty, in violation of O.C.G.A. § 16-12-4(b), based on a statement at the plea hearing from the defendant's counsel that due to the defendant's medical conditions of degenerative joint disease and diabetes, the defendant was unable to care for the large number of animals on the property alone. *Johnson v. State*, 282 Ga. App. 464, 638 S.E.2d 873 (2006).

Conditions of negotiated plea agreement unappealable. — Defendant's entry of a nolo contendere plea to two counts of animal cruelty, in violation of O.C.G.A. § 16-12-4(b), and the defendant's acceptance of the conditions of the negotiated plea agreement in open court which included restrictions on the number and type of animals that the defendant could own and the time limit within which animals on the defendant's property were to be relocated, constituted a waiver of the right to challenge the issue of the conditions of the sentence on appeal. *Johnson v. State*, 282 Ga. App. 464, 638 S.E.2d 873 (2006).

Cited in *Sirmans v. State*, 244 Ga. App. 252, 534 S.E.2d 862 (2000).

OPINIONS OF THE ATTORNEY GENERAL

Cockfighting. — Cockfighting constitutes cruelty to animals and is not exempt from prosecution under the guise of "scientific research" by virtue of the fact that

blood or tissue samples are taken from some birds and sent to a laboratory for disease testing. 2003 Op. Att'y Gen. No. 2003-7.

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, §§ 5, 7, 16 et seq., 39, 47 et seq.

C.J.S. — 3B C.J.S., Animals, § 194 et seq.

ALR. — What is "infamous" offense within constitutional or statutory provision in relation to presentment or indictment by grand jury, 24 ALR 1002.

Constitutionality of statute to prevent cruelty in trapping animals, 79 ALR 1308.

Indefiniteness of penal statute or ordinance relating to cruelty, similar offenses, against animals, 144 ALR 1041.

Civil liability of landowner for killing or injuring trespassing dog, 15 ALR2d 578.

Law as to cats, 73 ALR2d 1032; 8 ALR4th 1287; 55 ALR4th 1080; 68 ALR4th 823.

What constitutes statutory offense of cruelty to animals, 82 ALR2d 794.

Measure, elements, and amount of damages for killing or injuring cat, 8 ALR4th 1287.

Applicability of state animal cruelty statute to medical or scientific experimentation employing animals, 42 ALR4th 860.

What constitutes offense of cruelty to animals—modern cases, 6 ALR5th 733.
Construction and application of Horse

Protection Act of 1970 (15 USCS § 1821 et seq.), 131 ALR Fed. 363.

16-12-5. Tattooing.

(a) As used in this Code section, the term “tattoo” means to mark or color the skin of any person by pricking in, inserting, or implanting pigments, except when performed by a physician licensed as such pursuant to Chapter 34 of Title 43.

(b) It shall be unlawful for any person to tattoo the body of any person within any area within one inch of the nearest part of the eye socket of such person. Any person who violates this Code section shall be guilty of a misdemeanor. (Code 1981, § 16-12-5, enacted by Ga. L. 1990, p. 1866, § 1.)

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting not required for violation of section. — Violation of O.C.G.A. § 16-12-5 is not, at this time,

designated as an offense for which those charged with a violation are to be fingerprinted. 1990 Op. Att’y Gen. No. 90-22.

ARTICLE 2

GAMBLING AND RELATED OFFENSES

Cross references. — Lotteries, Ga. Const. 1983, Art. I, Sec. II, Para. VIII.

Administrative rules and regulations. — Nonprofit BINGO games, Offi-

cial Compilation of the Rules and Regulations of the State of Georgia, Georgia Bureau of Investigation, Ch. 92-2.

RESEARCH REFERENCES

ALR. — Validity, construction, and application of statutes or ordinances involved in prosecutions for possession of bookmaking paraphernalia, 51 ALR4th 796.

Private contests and lotteries: entrants’ rights and remedies, 64 ALR4th 1021.

PART 1

GAMBLING

Law reviews. — For comment on *Marchetti v. United States*, 390 U.S. 39, 88 S. Ct. 697, 19 L. Ed. 2d 889 (1968),

applying Fifth Amendment privilege to disclosure of gambling income, see 19 Mercer L. Rev. 433 (1968).

OPINIONS OF THE ATTORNEY GENERAL

So-called sweepstakes and other promotional contest schemes of a

lottery-like nature are illegal. 1972 Op. Att’y Gen. No. U72-69.

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Enforcement of Casino Gambling Debts, 71 POF3d 193.

Enforcement of International Gambling Debts, 87 POF3d 347.

ALR. — Retaking of money lost at gambling as robbery or larceny, 42 ALR 741; 116 ALR 997.

Racing as a game within statute, 45 ALR 998.

Margin transactions or dealings in futures as within constitution or statutes providing for recovery back of money paid on gaming consideration, 49 ALR 1085.

Legality of scheme purporting a purchase and sale of horses or dogs in connection with racing exhibitions, 79 ALR 576.

Rights and remedies in respect of money in gambling machine or other receptacle, used in connection with gambling, seized by public authorities, 79 ALR 1007.

Construction and application of statutes permitting specified forms of betting, 117 ALR 828.

Winner's rights and remedies in respect of pari-mutuel and similar legalized betting systems, 165 ALR 838.

Action to recover money or property lost and paid through gambling as affected by statute of limitations, 22 ALR2d 1390.

Entrapment to commit offense with respect to gambling or lotteries, 31 ALR2d 1212.

Right to recover money lent for gambling purposes, 53 ALR2d 345.

Participation in gambling activities as bar to action for personal injury or death, 77 ALR2d 961.

Criminal conspiracies as to gambling, 91 ALR2d 1148.

What constitutes such discriminatory prosecution or enforcement of laws as to provide valid defense in state criminal proceedings, 95 ALR3d 280.

Criminal liability of member or agent of private club or association, or of owner or lessor of its premises, for violation of state or local liquor or gambling laws thereon, 98 ALR3d 694.

Admissibility of expert testimony as to modus operandi of crime - modern cases, 31 ALR 4th 798.

State lotteries: actions by ticketholders against state or contractor for state, 40 ALR4th 662.

Validity, construction, and application of statutes or ordinances involved in prosecutions for transmission of wagers or wagering information related to bookmaking, 53 ALR4th 801.

Private contests and lotteries: entrants' rights and remedies, 64 ALR4th 1021.

Validity, construction, and application of statute or ordinance prohibiting or regulating use or occupancy of premises for bookmaking or pool selling, 82 ALR4th 356.

16-12-20. Definitions.

As used in this part, the term:

(1) "Bet" means an agreement that, dependent upon chance even though accompanied by some skill, one stands to win or lose something of value. A bet does not include:

(A) Contracts of indemnity or guaranty or life, health, property, or accident insurance; or

(B) An offer of a prize, award, or compensation to the actual contestants in any bona fide contest for the determination of skill, speed, strength, or endurance or to the owners of animals, vehicles, watercraft, or aircraft entered in such contest.

(2) "Gambling device" means:

(A) Any contrivance which for a consideration affords the player an opportunity to obtain money or other thing of value, the award of which is determined by chance even though accompanied by some skill, whether or not the prize is automatically paid by contrivance;

(B) Any slot machine or any simulation or variation thereof;

(C) Any matchup or lineup game machine or device, operated for any consideration, in which two or more numerals, symbols, letters, or icons align in a winning combination on one or more lines vertically, horizontally, diagonally, or otherwise, without assistance by the player. Use of skill stops shall not be considered assistance by the player; or

(D) Any video game machine or device, operated for any consideration, for the play of poker, blackjack, any other card game, or keno or any simulation or variation of any of the foregoing, including, but not limited to, any game in which numerals, numbers, or any pictures, representations, or symbols are used as an equivalent or substitute for cards in the conduct of such game.

Any item described in subparagraph (B), (C), or (D) of this paragraph shall be a prohibited gambling device subject to and prohibited by this part, notwithstanding any inference to the contrary in any other law of this state.

(3) "Gambling place" means any real estate, building, room, tent, vehicle, boat, or other property whatsoever, one of the principal uses of which is the making or settling of bets; the receiving, holding, recording, or forwarding of bets or offers to bet; or the conducting of a lottery or the playing of gambling devices.

(4) "Lottery" means any scheme or procedure whereby one or more prizes are distributed by chance among persons who have paid or promised consideration for a chance to win such prize, whether such scheme or procedure is called a pool, lottery, raffle, gift, gift enterprise, sale, policy game, or by some other name. A lottery shall also include the organization of chain letter or pyramid clubs as provided in Code Section 16-12-38. A lottery shall not mean a:

(A) Promotional giveaway or contest which conforms with the qualifications of a lawful promotion specified in paragraph (16) of subsection (b) of Code Section 10-1-393;

(B) Scheme whereby a business gives away prizes to persons selected by lot if such prizes are made on the following conditions:

(i) Such prizes are conducted as advertising and promotional undertakings in good faith solely for the purpose of advertising the goods, wares, and merchandise of such business; and

(ii) No person to be eligible to receive such prize shall be required to:

(I) Pay any tangible consideration to the operator of such business in the form of money or other property or thing of value;

(II) Purchase any goods, wares, merchandise, or anything of value from such business; or

(III) Be present or be asked to participate in a seminar, sales presentation, or any other presentation, by whatever name denominated, in order to win such prizes; or

(C) Raffle authorized under Code Section 16-12-22.1. (Code 1933, § 26-2701, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1975, p. 1072, § 2; Ga. L. 1982, p. 1661, § 3; Ga. L. 1985, p. 437, § 1; Ga. L. 1986, p. 1313, § 3; Ga. L. 1987, p. 1386, § 3; Ga. L. 1995, p. 832, § 1; Ga. 2001, Ex. Sess., p. 312, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1988, in paragraph (4) a period was added at the end of the second sentence and a comma was added following “presentation” the second time it appeared in division (4)(B)(ii)(III).

Editor’s notes. — Ga. L. 2001, Ex. Sess., p. 312, § 4, not codified by the General Assembly, provides that: “This Act is not intended to, and should not be construed to, affect the legality of the repair, transport, possession, or use of otherwise prohibited gambling devices on maritime vessels within the jurisdiction of the State of Georgia. To the extent that such repair, transport, possession, or use was lawful prior to the enactment of this Act, it shall not be prohibited by this Act; and to the extent that such repair, transport, possession, or use was prohibited prior to the enactment of this Act, it shall not be permitted by this Act.”

Ga. L. 2001, Ex. Sess., p. 312, § 5, not codified by the General Assembly, pro-

vides that: “During the period beginning January 1, 2002, and ending June 30, 2002, it shall not be unlawful to possess in this state a machine or device described in subparagraph (B), (C), or (D) of paragraph (2) of Code Section 16-12-20, if: (1) Such machine is not in use; (2) Such machine is in transit to a storage facility or in a storage facility, which said storage facility is a secured facility and no part of same is accessible by anyone other than employees of said facility or employees of the owner of said machine; and (3) Such machine is not located in a place which is open to the public and is not located in a private club.”

Law reviews. — For note discussing organized crime in Georgia with respect to the application of state gambling laws, and suggesting proposals for combatting organized crime, see 7 Ga. St. B.J. 124 (1970).

For comment on *Boyd v. Piggly Wiggly S., Inc.*, 115 Ga. App. 628, 155 S.E.2d 630 (1967), see 2 Ga. L. Rev. 132 (1967).

JUDICIAL DECISIONS

Editor’s notes. — In light of the similarity of the statutory provisions, decisions under former Penal Code 1895, § 406, former Penal Code 1910, §§ 397 and 398, and former Code 1933, §§ 26-6501 and 26-6502, as they read

prior to revision of this title by Ga. L. 1968, p. 1249, are included in the annotations for this Code section.

Applying the “actual use” test to case concerning confiscation of gambling equipment, evidence was not suf-

ficient to subject the equipment to confiscation where it was not shown that it was actually used for gambling. *Monte Carlo Parties, Ltd. v. Webb*, 253 Ga. 508, 322 S.E.2d 246 (1984).

It was error to use the functional use test to find that video poker game machines were gambling devices. To reason that a machine is a gambling device merely because it mimics a card game that "historically" had been used for gambling is much the same as saying the machine is a gambling device because it could be used for gambling purposes, whether it is actually so used or not. This is the functional use test rejected in *Monte Carlo Parties, Ltd. v. Webb*, 253 Ga. 508, 322 S.E.2d 246 (1984). *Webb v. City of Rossville*, 198 Ga. App. 294, 401 S.E.2d 312 (1991).

One may be acquitted of gambling but convicted of operating a gambling house. — Gambling is one thing and operating a gambling house is a kindred but entirely different thing and different evidence is required to convict of these separate offenses. No absurdity or repugnancy is created by acquittal of gambling and conviction of operating a gambling house. *McGahee v. State*, 133 Ga. App. 964, 213 S.E.2d 91 (1975).

In a lottery, there must be union of consideration, chance, and prize. *Barker v. State*, 56 Ga. App. 705, 193 S.E. 605 (1937) (decided under former Code 1933, §§ 26-6501, 26-6502); *Harrington v. State*, 97 Ga. App. 315, 103 S.E.2d 126 (1958) (decided under former Code 1933, §§ 26-6501, 26-6502); *Boyd v. Piggly Wiggly S., Inc.*, 115 Ga. App. 628, 155 S.E.2d 630 (1967), for comment, see 2 Ga. L. Rev. 132 (1967) (decided under former Code 1933, § 26-6501).

Three essentials of a lottery are consideration, prize, and chance. *Equitable Loan & Sec. Co. v. Waring*, 117 Ga. 599, 44 S.E. 320, 97 Am. St. R. 177, 62 L.R.A. 93 (1903); *Sparkman v. State*, 209 Ga. App. 763, 434 S.E.2d 564 (1993) (decided under former Penal Code 1895, § 406).

It matters not that value of thing hazarded is small or infinitesimal. — "Lottery" imports a scheme or device for hazarding of money or other thing of value by chance. It matters not that value of

thing hazarded is small or infinitesimal if in fact it does have some value. *AAA Amusements, Inc. v. State*, 106 Ga. App. 663, 127 S.E.2d 919 (1962) (decided under former Code 1933, §§ 26-6501, 26-6502).

When only priority of payment is determined by chance, scheme does not constitute lottery. *Equitable Loan & Sec. Co. v. Waring*, 117 Ga. 599, 44 S.E. 320, 97 Am. St. R. 177, 62 L.R.A. 93 (1903) (decided under former Penal Code 1895, § 406).

Gift enterprise defined. — Gift enterprise is a sporting artifice by which, for example a merchant or tradesman sells wares for their market value, but, by way of inducement, gives to each purchaser a ticket which entitles the purchaser to a chance to win certain prizes, to be determined after the manner of a lottery. *Barker v. State*, 56 Ga. App. 705, 193 S.E. 605 (1937) (decided under former Code 1933, § 26-6501).

For definitions of "chance," "similar scheme," and "gift enterprise," see *Russell v. Equitable & Sec. Co.*, 129 Ga. 154, 58 S.E. 881, 12 Ann. Cas. 129 (1907) (decided under former Penal Code 1895, § 406).

Punchboard constituting gambling device. — See *Hobbs v. K. & S. Sales Co.*, 35 Ga. App. 226, 132 S.E. 775 (1926) (decided under former Penal Code 1910, § 397).

Slot machines are not for amusement where played for something of value. — An apparatus known as a slot machine, by which a person depositing money therein may, by chance, get directly or indirectly money or articles or value worth either more or less than money deposited, falls within purview of former Code 1933, §§ 26-6501, 26-6502, and cannot be treated as one kept only for amusement. *Childs v. State*, 70 Ga. App. 99, 27 S.E.2d 470 (1943) (decided under former Code 1933, §§ 26-6501, 26-6502) (see O.C.G.A. § 16-12-20).

Possession of machines designed for gambling purposes. — Possession of machines designed for gambling purposes is illegal under the Georgia Video Poker Act of 2001, O.C.G.A. § 16-12-20 et seq. *Jones v. State*, 276 Ga. App. 810, 625 S.E.2d 4 (2005).

One may be guilty of operating a gambling house without participating in actual gambling. *Miller v. State*, 48 Ga. App. 786, 173 S.E. 491 (1934) (decided under former Code 1933, §§ 26-6501, 26-6502).

"Gambling devices." — Trial court did not err in allowing the witnesses in defendant's trial for possession of illegal gambling machines to testify that the machines were "gambling devices," as the jury had to determine whether defendant sold a machine that detectives testified was set up for gambling to a witness, who then sold the machine to the detectives,

and whether that machine was illegal under O.C.G.A. § 16-12-20(2); describing the machines the detectives seized as "gambling machines" did not answer those questions. *Jones v. State*, 276 Ga. App. 810, 625 S.E.2d 4 (2005).

Cited in *Tierce v. State*, 122 Ga. App. 845, 178 S.E.2d 913 (1970); *St. John's Melkite Catholic Church v. Commissioner of Revenue*, 240 Ga. 733, 242 S.E.2d 108 (1978); *Drewry v. State*, 201 Ga. App. 674, 411 S.E.2d 898 (1991); *State v. Old S. Amusements, Inc.*, 275 Ga. 274, 564 S.E.2d 710 (2002).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, §§ 26-6501 and 26-6502 are included in the annotations for this Code section.

Electronic slot machines are gambling devices per se; the slot machines are contraband; the slot machines can be seized and destroyed as contraband; possession of such devices is a crime; no demonstration of operation of any such device is necessary antecedent to the machine's seizure, nor is any demonstration necessary to establish basis of criminal prosecution for possession of that device. 1971 Op. Att'y Gen. No. 71-167.

Fund-raising activities constituting gambling. — Certain fund-raising activities, often for charitable purposes and generally designated as "Las Vegas Night" or "Casino Night," constitute gambling or commercial gambling and the equipment used at these activities is gambling paraphernalia. 1983 Op. Att'y Gen. No. 83-48.

Pinball machines operated for amusement and not gaming or gambling are legal. — Keeping, maintaining or employing of slot machines is a misdemeanor; however, keeping, maintaining or employing of pinball machines is not illegal where they are operated for purpose of amusement and no gaming or gambling is connected with their operation. 1945-47

Op. Att'y Gen. p. 104 (decided under former Code 1933, § 26-6502).

Only if a coin-operated game can register more than fifteen free replays and has a "trip switch" allowing games to be erased other than by reactivating the machine for additional plays is the device a prohibited gambling device; if such a game is for bona fide amusement purposes only, it is legal. However, the transfer of anything of value in exchange for a free replay on any coin operated device, whether or not the device constitutes a gambling device per se, is illegal. 1990 Op. Att'y Gen. No. 90-15.

Video slot machine which involves no skill in the machine's operation and offers a ticket for a value of up to \$5.00 in merchandise is a "gambling device". 1996 Op. Att'y Gen. No. U96-18.

Operation of a sweepstakes where a player can determine if the player has the "winning number" by calling a "dial-it" number is a "lottery," as that term is defined by O.C.G.A. § 16-12-20. 1984 Op. Att'y Gen. No. 84-83.

Gift-enterprise and sweepstake schemes constitute lotteries, and are prohibited in Georgia. 1973 Op. Att'y Gen. No. U73-115.

Bonuses or rebates to customers who provide for additional sales of produce are not lotteries. 1962 Op. Att'y Gen. p. 447 (decided under former Code 1933, § 26-6501).

RESEARCH REFERENCES

Am. Jur. 2d. — 38 Am. Jur. 2d, Gambling, §§ 5 et seq., 64, 65.

C.J.S. — 38 C.J.S., Gaming, §§ 1, 2, 11 et seq., 147 et seq.

ALR. — Loan or investment association as a lottery, 28 ALR 1311.

Scheme by which award depends upon votes as a lottery, 41 ALR 1484.

Scheme for advertising or stimulating legitimate business as a lottery, 48 ALR 1115; 57 ALR 424; 103 ALR 866; 109 ALR 709; 113 ALR 1121.

Slot vending machine as gambling device, 81 ALR 177.

Coin-operated or slot machines as lottery, 101 ALR 1126.

"Numbers (or number) game" or "policy game" as a lottery, 105 ALR 305.

Constitutionality of statute prohibiting giving of premiums or trading stamps with purchases of commodities, 124 ALR 341; 133 ALR 1087.

Slot machine within prohibitory statute or ordinance as limited to gambling device, 132 ALR 1004.

What are games of chance, games of skill, and mixed games of chance and skill, 135 ALR 104.

Punchboard as a lottery, 163 ALR 1279.

Coin-operated pinball machine or similar device, played for amusement only or confining reward to privilege of free replays, as prohibited or permitted by anti-gambling laws, 89 ALR2d 815.

Bridge as within gambling laws, 97 ALR2d 1420.

Paraphernalia or appliances used for recording gambling transactions or receiving or furnishing gambling information as gaming "devices" within criminal statute or ordinance, 1 ALR3d 726.

Validity of pyramid distribution plan, 54 ALR3d 217.

Validity of statute or ordinance prohibiting or regulating bookmaking or pool selling, 80 ALR4th 1079.

Right to recover money lent for gambling purposes, 74 ALR5th 369.

16-12-21. Gambling.

(a) A person commits the offense of gambling when he:

(1) Makes a bet upon the partial or final result of any game or contest or upon the performance of any participant in such game or contest;

(2) Makes a bet upon the result of any political nomination, appointment, or election or upon the degree of success of any nominee, appointee, or candidate; or

(3) Plays and bets for money or other thing of value at any game played with cards, dice, or balls.

(b) A person who commits the offense of gambling shall be guilty of a misdemeanor. (Laws 1847, Cobb's 1851 Digest, pp. 819, 820; Ga. L. 1859, p. 59, § 1; Code 1863, § 4425; Ga. L. 1865-66, p. 233, § 2; Code 1868, § 4466; Code 1873, § 4541; Code 1882, § 4541; Penal Code 1895, § 401; Penal Code 1910, § 392; Code 1933, § 26-6404; Code 1933, § 26-2702, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1970, p. 690, § 1.)

Cross references. — Void status of gambling contracts, § 13-8-3. Prohibition against contracts of sale for future delivery of cotton, grain, stocks, or other com-

modities where it is not intended that such commodities actually be delivered, § 13-9-3. Parent's right of action against person playing and betting at game of chance with minor child for money or other value, § 51-1-18.

Law reviews. — For article, "Misde-

meanor Sentencing in Georgia," see 7 Ga. St. B.J. 8 (2001).

For note discussing organized crime in Georgia with respect to the application of state gambling laws, and suggesting proposals for combatting organized crime, see 7 Ga. St. B.J. 124 (1970).

JUDICIAL DECISIONS

Former Penal Code 1895, § 401 apparently was designed to prevent gambling of any nature. *Fleming v. State*, 125 Ga. 17, 53 S.E. 579 (1906) (see O.C.G.A. § 16-12-21).

Gambling obligations unenforceable. — Gambling transactions contravene public policy of Georgia and constitute obligations unenforceable in its courts. *Gulf Collateral, Inc. v. Morgan*, 415 F. Supp. 319 (S.D. Ga. 1976).

One may be acquitted of gambling but convicted of operating a gambling house. — Gambling is one thing and operating a gambling house is a kindred but entirely different thing; and different evidence is required to convict of these separate offenses. No absurdity or repugnancy is created by acquittal of gambling and conviction of operating a gambling house. *McGahee v. State*, 133 Ga. App. 964, 213 S.E.2d 91 (1975).

Game may be one of chance or skill for stakes. *Fleming v. State*, 125 Ga. 17, 53 S.E. 579 (1906).

It is not necessary that money be the stake. *Alexander v. City of Atlanta*, 13 Ga. App. 354, 79 S.E. 177 (1913).

Evidence sufficient for conviction. — Evidence of gambling devices and expert testimony on the purpose of dogfighting was sufficient to support a conviction. *Hargrove v. State*, 253 Ga. 450, 321 S.E.2d 104 (1984) (see O.C.G.A. § 16-12-37).

Evidence that defendant was 400 miles from defendant's home shortly after dawn in a remote area of the state where dogfighting and gambling were taking place, that defendant was apprehended directly next to a pit where dogfighting was underway, and that the defendant was arrested with \$899 on defendant's person was sufficient for a rational trier of fact to conclude that defendant was guilty of allow-

ing dogfighting to take place and gambling. *Barton v. State*, 253 Ga. 478, 322 S.E.2d 54 (1984).

Evidence insufficient for conviction. — When the state offered no evidence linking defendants to the area where dogfighting and gambling were taking place, but only showed that they were "brought back" from an undetermined place by an unidentified officer and searched next to the dog pit, evidence was insufficient to support convictions for dogfighting and gambling. *Barton v. State*, 253 Ga. 478, 322 S.E.2d 54 (1984).

Recovery in tort for personal injuries sustained while gambling. — Generally, participation in gambling activities does not prevent recovery in tort for personal injuries in absence of causal relation between illegal act and injuries sustained. *Johnson v. Thompson*, 111 Ga. App. 654, 143 S.E.2d 51 (1965).

Sentence enhancement inapplicable. — Enhancement under U.S. Sentencing Guidelines Manual § 2T1.1(b)(1) was not applied for purposes of calculating defendant's sentence for tax evasion; although gambling was a crime under O.C.G.A. § 16-12-21, defendant's statement that the defendant failed to pay taxes on some poker winnings, even if such winnings were considered by the jury in acquitting defendant of racketeering and bribery charges, was not sufficient to find by a preponderance of the evidence that defendant received more than \$10,000 in any given year from unlawful gambling. *United States v. Campbell*, No. 1:04-CR-0424-RWS, 2006 U.S. Dist. LEXIS 96565 (N.D. Ga. June 15, 2006), aff'd, 491 F.3d 1306 (11th Cir. 2007).

Cited in *United States v. Crockett*, 506 F.2d 759 (5th Cir. 1975); *Dennard v. State*, 265 Ga. App. 229, 593 S.E.2d 694 (2004).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, §§ 26-6501 26-6502 are included in the annotations for this Code section.

Fund-raising activities constituting gambling. — Certain fund-raising activities, often for charitable purposes and generally designated as "Las Vegas Night" or "Casino Night," constitute gambling or commercial gambling and the equipment used at these activities is gambling paraphernalia. 1983 Op. Att'y Gen. No. 83-48.

Magazine advertising contests are not per se illegal, but are illegal if they

violate the lottery law. 1970 Op. Att'y Gen. No. U79-123.

If an individual signs the individual's name to an entry blank with a number on it and returns it to the magazine that is conducting a contest, the individual is not in violation of lottery or gift enterprise scheme statutes. 1969 Op. Att'y Gen. No. 69-58.

Conducting a raffle in this state violated former Code 1933, §§ 26-6501 and 26-6502 prohibiting lotteries regardless of how worthy the cause. 1969 Op. Att'y Gen. No. 69-37 (decided under former Code 1933, §§ 26-6501 and 26-6502) (see O.C.G.A. § 16-12-21).

RESEARCH REFERENCES

Am. Jur. 2d. — 38 Am. Jur. 2d, Gambling, §§ 1 et seq., 22 et seq.

C.J.S. — 38 C.J.S., Gaming, § 131 et seq.

ALR. — Each bet or play at gaming on a single occasion, as constituting a distinct offense, 35 ALR 89.

Constitutionality of statutes forbidding or regulating dissemination of betting odds or other gambling information, 47 ALR 1135.

Punchboard as a lottery, 163 ALR 1279.

Rights of owner of stolen money as against one who won it in gambling transaction from thief, 44 ALR2d 1242.

Bridge as within gambling laws, 97 ALR2d 1420.

Validity and construction of statute exempting gambling operations carried on by religious, charitable, or other nonprofit organizations from general prohibitions against gambling, 42 ALR3d 663.

Construction and application of state or municipal enactments relating to policy or numbers games, 70 ALR3d 897.

Validity, construction, and application of statute or ordinance prohibiting or regulating use or occupancy of premises for bookmaking or pool selling, 82 ALR4th 356.

16-12-22. Commercial gambling.

(a) A person commits the offense of commercial gambling when he intentionally does any of the following acts:

- (1) Operates or participates in the earnings of a gambling place;
- (2) Receives, records, or forwards a bet or offer to bet;
- (3) For gain, becomes a custodian of anything of value bet or offered to be bet;
- (4) Contracts to have or give himself or another the option to buy or sell or contracts to buy or sell at a future time any gain or other commodity whatsoever or any stock or security of any company, when it is at the time of making such contract intended by both parties thereto that the contract to buy or sell, the option whenever exercised

or the contract resulting therefrom, shall be settled not by the receipt or delivery of such property but by the payment only of differences in prices thereof;

(5) Sells chances upon the partial or final result of or upon the margin of victory in any game or contest or upon the performance of any participant in any game or contest or upon the result of any political nomination, appointment, or election or upon the degree of success of any nominee, appointee, or candidate;

(6) Sets up or promotes any lottery, sells or offers to sell, or knowingly possesses for transfer or transfers any card, stub, ticket, check, or other device designed to serve as evidence of participation in any lottery; or

(7) Conducts, advertises, operates, sets up, or promotes a bingo game without having a valid license to operate a bingo game as provided by law.

(b) A person who commits the offense of commercial gambling shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years or by a fine not to exceed \$20,000.00, or both. (Code 1933, § 26-2703, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1970, p. 236, § 6; Ga. L. 1977, p. 747, § 1; Ga. L. 1978, p. 851, § 1.)

Law reviews. — For note discussing organized crime in Georgia with respect to the application of state gambling laws, and suggesting proposals for combatting organized crime, see 7 Ga. St. B.J. 124 (1970).

For comment on *Boyd v. Piggly Wiggly S., Inc.*, 115 Ga. App. 628, 155 S.E.2d 630 (1967), see 2 Ga. L. Rev. 132 (1967).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Penal Code 1895, §§ 406 and 408, former Penal Code 1910, §§ 397 and 398, and former Code 1933, §§ 26-6501 and 26-6502, as they read prior to revision of the title by Ga. L. 1968, p. 1249, all of which sections dealt with operation of lotteries are included in the annotations for this Code section.

Purpose of former provisions was to suppress lotteries by making it an offense to maintain or carry on one, or to do any of the several acts entering into conduct of such business; and the section was framed, doubtless, with a view to reaching all persons who might carry on, or participate in carrying on, the forbidden enter-

prise. *Morrow v. State*, 62 Ga. App. 718, 9 S.E.2d 699 (1940) (decided under former Code 1933, §§ 26-6501, 26-6502); *Goodrum v. State*, 69 Ga. App. 373, 25 S.E.2d 585 (1943) (decided under former Code 1933, §§ 26-6501, 26-6502); *Walker v. State*, 69 Ga. App. 375, 25 S.E.2d 587 (1943) (decided under former Code 1933, §§ 26-6501, 26-6502); *Britton v. State*, 69 Ga. App. 868, 27 S.E.2d 100 (1943) (decided under former Code 1933, §§ 26-6501, 26-6502); *Jackson v. State*, 71 Ga. App. 138, 30 S.E.2d 354 (1944) (decided under former Code 1933, §§ 26-6501, 26-6502); *Fountain v. State*, 71 Ga. App. 191, 30 S.E.2d 359 (1944) (decided under former Code 1933, §§ 26-6501, 26-6502); *Callahan v. State*,

71 Ga. App. 302, 30 S.E.2d 782 (1944) (decided under former Code 1933, §§ 26-6501, 26-6502); *Davis v. State*, 72 Ga. App. 428, 33 S.E.2d 747 (1945) (decided under former Code 1933, §§ 26-6501, 26-6502); *Anderson v. State*, 72 Ga. App. 510, 34 S.E.2d 458 (1945) (decided under former Code 1933, §§ 26-6501, 26-6502); *Huff v. State*, 81 Ga. App. 461, 59 S.E.2d 43 (1950) (decided under former Code 1933, §§ 26-6501, 26-6502).

Relationship with federal Travel Act. — When the defendant allegedly provided account numbers to a sports book agent and attempted to collect the agent's gambling debt, the defendant's motion for judgment of acquittal was granted as to a Travel Act, 18 U.S.C. § 1952, count because the government failed to demonstrate an underlying unlawful activity under O.C.G.A. § 16-12-22 since there was no indication that the agent intended or attempted to share in the defendant's or the sports book's earnings. *United States v. Corrar*, 512 F. Supp. 2d 1280 (N.D. Ga. 2007).

Anyone participating in design and execution of a lottery is a criminal. *Goodrum v. State*, 69 Ga. App. 373, 25 S.E.2d 585 (1943) (decided under former Code 1933, §§ 26-6501, 26-6502); *Britton v. State*, 69 Ga. App. 868, 27 S.E.2d 100 (1943) (decided under former Code 1933, §§ 26-6501, 26-6502); *Fountain v. State*, 71 Ga. App. 191, 30 S.E.2d 359 (1944) (decided under former Code 1933, §§ 26-6501, 26-6502); *West v. State*, 74 Ga. App. 453, 40 S.E.2d 156 (1946) (decided under former Code 1933, §§ 26-6501, 26-6502).

Purchasers of lottery tickets are not punished. *Roney v. Crawford*, 135 Ga. 1, 68 S.E. 701 (1910) (decided under former Penal Code 1895, §§ 406, 408).

Test of a lottery is in the lottery's working rather than in the lottery's wording. *Boyd v. Piggly Wiggly S., Inc.*, 115 Ga. App. 628, 155 S.E.2d 630 (1967) (decided under former Code 1933, §§ 26-6501, 26-6502), commented on in 2 Ga. L. Rev. 132 (1967).

Possession of gambling devices and equipment and operating a gambling place are separate offenses. — Al-

though arising from same transaction, offenses of possession of gambling devices and equipment, and commercial gambling by operating a gambling place, are separate and distinct. *Baxter v. State*, 134 Ga. App. 286, 214 S.E.2d 578, cert. denied, 423 U.S. 895, 96 S. Ct. 194, 46 L. Ed. 2d 127 (1975).

Georgia need not recognize and enforce another state's laws deemed obnoxious to the state's public policy. *Gulf Collateral, Inc. v. Morgan*, 415 F. Supp. 319 (S.D. Ga. 1976).

Gambling obligations unenforceable. — Gambling transactions contravene public policy of Georgia and constitute obligations unenforceable in the state's courts. *Gulf Collateral, Inc. v. Morgan*, 415 F. Supp. 319 (S.D. Ga. 1976).

Merely observing cash and parlay cards in defendant's bedroom in multiple-occupancy building was not sufficient to establish that the goods were found in defendant's possession, especially when the lone witness indicated no knowledge of where the evidence was found. *Bing v. State*, 178 Ga. App. 288, 342 S.E.2d 762 (1986).

Consideration may be found although not required by promoter's rules. — Consideration as an ingredient of a prohibited lottery or gift enterprise is shown when there is present, in actual working of sales promotion scheme, a class of persons who, in addition to receiving or being entitled to chances on prizes, supply consideration for all chances in bulk by purchasing whatever promoter is selling, whether purchasers were required to do so or not under wording of the promoter's rules. *Boyd v. Piggly Wiggly S., Inc.*, 115 Ga. App. 628, 155 S.E.2d 630 (1967) (decided under former Code 1933, §§ 26-6501, 26-6502), commented on in 2 Ga. L. Rev. 132 (1967).

Amusement and entertainment as thing of value. — Amusement and entertainment (consisting of a displayed horoscope or fortune) is usually and generally recognized as a thing of value within meaning of former Penal Code 1910, §§ 397, 398. *Jenner v. State*, 173 Ga. 10, 159 S.E. 564 (1931) (decided under former Penal Code 1910, §§ 397, 398).

Fact that skill or proficiency might enter into operation of machine

makes no difference. Any scheme or device operated by a person by which one participating therein might either lose money invested or get more than one's money's worth, the operator retaining the money so lost, is a scheme or device for hazarding of money. *Sparks v. State*, 48 Ga. App. 498, 173 S.E. 216 (1934) (decided under former Code 1933, §§ 26-6501, 26-6502); *Lewis v. State*, 55 Ga. App. 159, 189 S.E. 566 (1937) (decided under former Code 1933, §§ 26-6501, 26-6502).

"Closed participation" gift enterprise schemes are illegal. — It is well settled in this state that a "closed participation" gift enterprise scheme — that is, one which is open only to patrons purchasing goods, services or whatever promoter is trying to push by scheme — is illegal and contrary to public policy. *Boyd v. Piggly Wiggly S., Inc.*, 115 Ga. App. 628, 155 S.E.2d 630 (1967) (decided under former Code 1933, §§ 26-6501, 26-6502), commented on in 2 Ga. L. Rev. 132 (1967).

Meaning of "participation." — Regarding the phrase "participate in the earnings of a gambling place" in O.C.G.A. § 16-12-22(a)(1), participating in earnings could require that the participant actually receive the earnings of the business, and earnings are things, not acts or processes, and thus the best reading of "participates" is not "to take part in something" but to "partake," which can mean "share in" or "receive a portion"; the intent of the phrase is to foreclose a defense by a mischievous investor who bankrolls a commercial gambling operation but then claims, when faced with prosecution, that the investor did not "operate" the enterprise. *United States v. Corrar*, 512 F. Supp. 2d 1280 (N.D. Ga. 2007).

Wagering on batting results at baseball game is a game of chance. — As between members of a baseball team, they may be engaged in a contest of skill, but as to spectators who wager upon outcome of particular batting results, it is, a game of chance. *Grant v. State*, 75 Ga. App. 784, 44 S.E.2d 513 (1947) (decided under former Code 1933, §§ 26-6501, 26-6502).

"Gift enterprise" defined. — A "gift enterprise" is a sporting artifice by which, for example a merchant or tradesman sells wares for their market value, but, by

way of inducement, gives to each purchaser a ticket which entitles the purchaser to a chance to win certain prizes, to be determined after manner of a lottery. *Barker v. State*, 56 Ga. App. 705, 193 S.E. 605 (1937) (decided under former Code 1933, §§ 26-6501, 26-6502).

Acting as a pick-up man is an act entering into conduct of lottery business. *Anderson v. State*, 72 Ga. App. 510, 34 S.E.2d 458 (1945) (decided under former Code 1933, §§ 26-6501, 26-6502).

Picking up lottery tickets as an integral part of organization engaged in lottery. *Ransom v. State*, 55 Ga. App. 292, 189 S.E. 924 (1937) (decided under former Code 1933, §§ 26-6501, 26-6502).

Intentional doing of prohibited act suffices, although defendant did not know it was illegal. — That defendant was ignorant of fact that defendant was violating the law does not relieve defendant of criminal intent if defendant intended to do the prohibited act of carrying on a "clearinghouse" for hazarding of money. *Wilson v. State*, 57 Ga. App. 839, 197 S.E. 48 (1938) (decided under former Code 1933, §§ 26-6501, 26-6502).

Where defendant's lottery operation covers several counties, each county has jurisdiction over defendant for trial, regardless of defendant's activities in other counties. *Lunsford v. State*, 60 Ga. App. 537, 4 S.E.2d 112 (1939) (decided under former Code 1933, §§ 26-6501, 26-6502).

Indictment must name kind of lottery. — When terms used in Code are generic, as is the word "lottery" (there being an unlimited variety of games of chance which fall under this general head) it is not sufficient that in indictment charge offense in same generic terms as in definition, but it must state particular offense intended to be charged, and an indictment which fails to name the kind of lottery or manner of operation of scheme or device charged to be a lottery is defective in that the indictment does not sufficiently apprise the defendant of offense charged. *President v. State*, 83 Ga. App. 731, 64 S.E.2d 596 (1951) (decided under former Code 1933, §§ 26-6501, 26-6502).

Presumption of ownership of lottery paraphernalia. — When lottery

paraphernalia was found in the home of the defendant, presumption was that the defendant owned the paraphernalia. *Stovall v. State*, 68 Ga. App. 27, 21 S.E.2d 914 (1942) (decided under former Code 1933, §§ 26-6501, 26-6502); *Mills v. State*, 71 Ga. App. 353, 30 S.E.2d 824 (1944) (decided under former Code 1933, §§ 26-6501, 26-6502).

Presumption of ownership is rebuttable. *Stovall v. State*, 68 Ga. App. 27, 21 S.E.2d 914 (1942) (decided under former Code 1933, §§ 26-6501, 26-6502).

One seeking recovery under sales promotion scheme awarding prizes by chance must show legality. — First burden which must be borne by a litigant seeking to enforce rights allegedly acquired in a sales promotion scheme whereby prizes are awarded by chance is that of showing that scheme is not illegal and contrary to public policy, for courts will not lend their aid in settling of disputes grounded in prohibited lotteries or gift enterprises. *Boyd v. Piggly Wiggly S., Inc.*, 115 Ga. App. 628, 155 S.E.2d 630 (1967) (decided under former Code 1933, §§ 26-6501, 26-6502), commented on in 2 Ga. L. Rev. 132 (1967).

Evidence sufficient for conviction. — When cockfighting was staged on the defendant's property on which an arena and bleachers were erected, the defendant was collecting the admission fees, and gamecocks with spurs and other fighting equipment were found on the premises,

the evidence was sufficient to show that the defendants were involved in the operation of organizing a cockfight and were guilty of both cruelty to animals and commercial gambling. *Morgan v. State*, 195 Ga. App. 52, 392 S.E.2d 715 (1990).

Evidence that the defendants operated a lottery based upon wagers and bets placed on a three-digit number selected from a closing figure of the New York Stock Exchange was sufficient to establish commercial gambling within the meaning of O.C.G.A. § 16-12-22, although the alleged activity did not include pool from which prizes were distributed. *Sparkman v. State*, 209 Ga. App. 763, 434 S.E.2d 564 (1993).

Evidence insufficient for conviction. — See *Whatley v. State*, 189 Ga. App. 173, 375 S.E.2d 245, cert. denied, 189 Ga. App. 913, 375 S.E.2d 245 (1988).

Cited in *Tierce v. State*, 122 Ga. App. 845, 178 S.E.2d 913 (1970); *Osbourne v. State*, 128 Ga. App. 81, 195 S.E.2d 662 (1973); *United States v. Crockett*, 506 F.2d 759 (5th Cir. 1975); *Rasmussen v. W.E. Hutton & Co.*, 68 F.R.D. 231 (N.D. Ga. 1975); *Pendleton v. City of Atlanta*, 236 Ga. 479, 224 S.E.2d 357 (1976); *Dowdy v. State*, 148 Ga. App. 498, 251 S.E.2d 571 (1978); *Rasmussen v. Thomson & McKinnon Auchincloss Kohlmeyer, Inc.*, 608 F.2d 175 (5th Cir. 1979); *Cox v. State*, 160 Ga. App. 157, 286 S.E.2d 482 (1981); *Evans v. State*, 252 Ga. 312, 314 S.E.2d 421 (1984); *Hardin v. NBC Universal, Inc.*, 283 Ga. 477, 660 S.E.2d 374 (2008).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions decisions under former Code 1933, §§ 26-6403, 26-6501, 26-6502, 26-6507 and 26-6508, as they read prior to revision of the title by Ga. L. 1968, p. 1249, are included in the annotations for this Code section.

Fund raising activities constituting commercial gambling. — Certain fund raising activities, often for charitable purposes and generally designated as "Las Vegas Night" or "Casino Night," constitute gambling or commercial gambling and the equipment used at these activities is gam-

bling paraphernalia. 1983 Op. Att'y Gen. No. 83-48.

Operation of a sweepstakes where a player can determine if the player has the "winning number" by calling a "dial-it" number constitutes commercial gambling by setting up and promoting a lottery in violation of O.C.G.A. § 16-12-22. 1984 Op. Att'y Gen. No. 84-83.

Sale of puts and calls does not constitute establishment and promotion of lottery. 1971 Op. Att'y Gen. No. 71-115.

Any game or device for hazarding money or other thing of value is unlawful in Georgia. 1948-49 Op. Att'y Gen.

p. 73 (decided under former Code 1933, §§ 26-6403, 26-6502).

Lottery, gift enterprises, or any similar schemes are completely and strictly forbidden and prohibited by the laws of Georgia and any person participating therein is guilty of an illegal and unlawful act. 1948-49 Op. Att'y Gen. p. 73 (decided under former Code 1933, §§ 26-6501, 26-6502).

Under Georgia law, "a promotional drawing" would be illegal. 1957 Op. Att'y Gen. p. 86 (decided under former Code 1933, § 26-6501).

Drawings for giving away merchandise for less than full purchase price as lottery. — Operating of suit club whereby drawings are held and suits awarded to winner without payment of full purchase price constitutes a lottery. 1948-49 Op. Att'y Gen. p. 492 (decided under former Code 1933, § 26-6502).

"Beano," a card game of chance and scheme for hazarding of money is a lottery. 1957 Op. Att'y Gen. p. 84 (decided under former Code 1933, §§ 26-6501, 26-6502).

Offering of door prizes partakes of nature of a lottery and as such prohibited. 1948-49 Op. Att'y Gen. p. 76 (decided under former Code 1933, §§ 26-6501, 26-6502).

Selling tickets for a dance and chance of winning a prize is unlawful. — Selling of tickets for a dance or any other purpose, and chance of winning an automobile or any other thing for a prize, upon purchase of ticket, would come within meaning of prohibited acts, and

therefore be in violation of Georgia law as applied to lottery, gift enterprises and similar scheme. 1948-49 Op. Att'y Gen. p. 73 (decided under former Code 1933, §§ 26-6501, 26-6502).

Slot machines as purely gambling devices are illegal in Georgia. 1948-49 Op. Att'y Gen. p. 75 (decided under former Code 1933, § 26-6502).

Pinball machines operated for amusement and not gaming or gambling are legal. — Keeping, maintaining or employing of slot machines is a misdemeanor, however, keeping, maintaining or employing of pinball machines is not illegal where they are operated for purpose of amusement and no gaming or gambling is connected with their operation. 1945-47 Op. Att'y Gen. p. 104 (decided under former Code 1933, § 26-6502).

Issuance of license to operate slot machine. — County commissioners are without authority to issue licenses to operate slot machines. 1957 Op. Att'y Gen. p. 35 (decided under former Code 1933, § 26-6502).

Issuance of such a license does not protect operator from prosecution for violating lottery laws. 1957 Op. Att'y Gen. p. 35 (decided under former Code 1933, § 26-6502).

It is illegal to transport gambling devices within this state in intrastate commerce; however, this state does not attempt to exercise jurisdiction over transportation of gambling devices in interstate commerce. 1960-61 Op. Att'y Gen. p. 113 (decided under former Code 1933, §§ 26-6502, 26-6507, 26-6508).

RESEARCH REFERENCES

Am. Jur. 2d. — 38 Am. Jur. 2d, Gambling, § 30 et seq.

ALR. — Each bet or play at gaming on a single occasion, as constituting a distinct offense, 35 ALR 89.

Scheme by which award depends upon votes as a lottery, 41 ALR 1484.

Constitutionality of statutes forbidding or regulating dissemination of betting odds or other gambling information, 47 ALR 1135.

Scheme for advertising or stimulating

legitimate business as a lottery, 103 ALR 866; 109 ALR 709; 113 ALR 1121.

Constitutionality of statute prohibiting giving of premiums or trading stamps with purchases of commodities, 124 ALR 341; 133 ALR 1087.

Punchboard as a lottery, 163 ALR 1279.

Bridge as within gambling laws, 97 ALR2d 1420.

Promotion schemes of retail stores as criminal offense under antigambling law, 29 ALR3d 888.

Construction and application of state or municipal enactments relating to policy or numbers games, 70 ALR3d 897.

Criminal liability of member or agent of private club or association, or of owner or lessor of its premises, for violation of state or local liquor or gambling laws thereon, 98 ALR3d 694.

Validity, construction, and application of statute or ordinance prohibiting or regulating use of messenger services to place

wagers in pari-mutuel pool, 78 ALR4th 483.

Validity, construction, and application of statute or ordinance prohibiting or regulating use or occupancy of premises for bookmaking or pool selling, 82 ALR4th 356.

Construction and application of statute or ordinance prohibiting or regulating bookmaking or pool selling, 84 ALR4th 740.

16-12-22.1. Raffles operated by nonprofit, tax-exempt organizations.

(a) It is the intention of the General Assembly that only nonprofit, tax-exempt churches, schools, civic organizations, or related support groups; nonprofit organizations qualified under Section 501(c) of the Internal Revenue Code, as amended; or bona fide nonprofit organizations approved by the sheriff, which are properly licensed pursuant to this Code section shall be allowed to operate raffles.

(b) As used in this Code section, the term:

(1) "Nonprofit, tax-exempt organization" means churches, schools, civic organizations, or related support groups; nonprofit organizations qualified under Section 501(c) of the Internal Revenue Code, as amended; or bona fide nonprofit organizations approved by the sheriff.

(2) "Operate," "operated," or "operating" means the direction, supervision, management, operation, control, or guidance of activity.

(3) "Raffle" means any scheme or procedure whereby one or more prizes are distributed by chance among persons who have paid or promised consideration for a chance to win such prize. Such term shall also include door prizes which are awarded to persons attending meetings or activities provided that the cost of admission to such meetings or activities does not exceed the usual cost of similar activities where such prizes are not awarded.

(4) "Sheriff" means the sheriff of the county in which the nonprofit tax-exempt organization is located.

(c) Any other law to the contrary notwithstanding, no nonprofit, tax-exempt organization shall be permitted to operate a raffle until the sheriff issues a license to the organization authorizing it to do so. The license described in this subsection is in addition to and not in lieu of any other licenses which may be required by this state or any political subdivision thereof, and no raffle shall be operated until such time as all requisite licenses have been obtained. In the event a nonprofit,

tax-exempt organization desires to conduct a raffle in more than one county, such organization shall not be required to obtain a license under this Code section in each county in which such raffle is to be conducted and shall only be required to obtain such license from the sheriff of the county in which the state headquarters of such organization are located.

(d)(1) Any nonprofit, tax-exempt organization desiring to obtain a license to operate raffles shall make application to the sheriff on forms prescribed by the sheriff. The sheriff may require the payment of an annual fee not to exceed \$100.00. No license shall be issued to any nonprofit, tax-exempt organization unless the organization has been in existence for 24 months immediately prior to the issuance of the license. The license will expire at 12:00 Midnight on December 31 following the granting of the license. Renewal applications for each calendar year shall be filed with the sheriff prior to January 1 of each year and shall be on a form prescribed by the sheriff.

(2) Each application for a license and each application for renewal of a license shall contain the following information:

(A) The name and home address of the applicant and, if the applicant is a corporation, association, or other similar legal entity, the names and home addresses of each of the officers of the organization as well as the names and addresses of the directors, or other persons similarly situated, of the organization;

(B) The names and home addresses of each of the persons who will be operating, advertising, or promoting the raffle;

(C) The names and home addresses of any persons, organizations, or other legal entities that will act as surety for the applicant or to which the applicant is financially indebted or to which any financial obligation is owed by the applicant;

(D) A determination letter from the Internal Revenue Service certifying that the applicant is an organization exempt under federal tax law;

(E) A statement affirming that the applicant is exempt under the income tax laws of this state under Code Section 48-7-25;

(F) The location at which the applicant will conduct the raffles and, if the premises on which the raffles are to be conducted is to be leased, a copy of the lease or rental agreement; and

(G) A statement showing the convictions, if any, for criminal offenses other than minor traffic offenses of each of the persons listed in subparagraphs (A), (B), and (C) of this paragraph.

(3) The sheriff shall refuse to grant a raffle license to any applicant who fails to provide fully the information required by this Code section.

(4) When a nonprofit, tax-exempt organization which operates or intends to operate raffles for residents and patients of a retirement home, nursing home, or hospital operated by that organization at which gross receipts are or will be limited to \$100.00 or less during each raffle and pays or will pay prizes having a value of \$100.00 or less during each raffle, then, notwithstanding any other provision of this Code section or any rule or regulation promulgated by the sheriff pursuant to the provisions of subsection (1) of this Code section, neither the applicant nor any of the persons whose names and addresses are required under subparagraphs (A) and (B) of paragraph (2) of this subsection shall be required to submit or provide fingerprints or photographs as a condition of being granted a license.

(e)(1) The sheriff shall have the specific authority to suspend or revoke any license for any violation of this Code section. Any licensee accused of violating any provision of this Code section shall be entitled, unless waived, to a hearing on the matter of the alleged violation conducted in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

(2) By making application for a license under this Code section, every applicant consents that the sheriff, as well as any of his agents, together with any prosecuting attorney, as well as any of his agents, may come upon the premises of any licensee or upon any premises on which any licensee is conducting a raffle for the purpose of examining the accounts and records of the licensee to determine if a violation of this Code section has occurred.

(f) The sheriff shall, upon the request of any prosecuting attorney or such prosecuting attorney's designee, certify the status of any organization as to that organization's exemption from payment of state income taxes as a nonprofit organization. The sheriff shall also upon request issue a certificate indicating whether any particular organization holds a currently valid license to operate a raffle. Such certificates properly executed shall be admissible in evidence in any prosecution, and Code Section 48-7-60, relative to the disclosure of income tax information, shall not apply to the furnishing of such certificate.

(g) Notwithstanding the other provisions of this Code section, the sheriff, upon receiving written evidence of the bona fide nonprofit, tax-exempt status of the applicant organization, shall be authorized to issue a special limited license to a nonprofit, tax-exempt organization which will allow it to operate up to three raffles during a calendar year. In such cases, the sheriff shall waive the application and license fee

provided for in subsection (d) of this Code section and the annual report provided for in subsection (j) of this Code section.

(h) Raffles shall be operated only on premises owned by the nonprofit, tax-exempt organization operating the raffle, on property leased by the nonprofit, tax-exempt organization and used regularly by that organization for purposes other than the operation of a raffle, or on property leased by the nonprofit, tax-exempt organization operating the raffle from another nonprofit, tax-exempt organization.

(i) No person under the age of 18 years shall be permitted to play any raffle conducted pursuant to any license issued under this Code section unless accompanied by an adult.

(j) On or before April 15 of each year, every nonprofit, tax-exempt organization engaged in operating raffles shall file with the sheriff a report disclosing all receipts and expenditures relating to the operation of raffles in the previous year. The report shall be in addition to all other reports required by law. The report shall be prepared and signed by a certified public accountant competent to prepare such a report and shall be deemed a public record subject to public inspection.

(k)(1) A licensee that conducts or operates a raffle shall maintain the following records for at least three years from the date on which the raffle is conducted:

(A) An itemized list of the gross receipts for each raffle;

(B) An itemized list of all expenses other than prizes that are incurred in the conducting of the raffle as well as the name of each person to whom the expenses are paid and a receipt for all of the expenses;

(C) A list of all prizes awarded during the raffle and the name and address of all persons who are winners of prizes of \$50.00 or more in value;

(D) An itemized list of the recipients other than the licensee of the proceeds of the raffle, including the name and address of each recipient to whom such funds are distributed; and

(E) A record of the number of persons who participate in any raffle conducted by the licensee.

(2) A licensee shall:

(A) Own all the equipment used to conduct a raffle or lease such equipment from an organization that is also licensed to conduct a raffle;

(B) Display its raffle license conspicuously at the location where the raffle is conducted;

(C) Conduct raffles only as specified in the licensee's application; and

(D) Not conduct more than one raffle during any one calendar day.

(3) No nonprofit, tax-exempt organization shall enter into any contract with any individual, firm, association, or corporation to have such individual, firm, association, or corporation operate raffles or concessions on behalf of the nonprofit, tax-exempt organization.

(4) A nonprofit, tax-exempt organization shall not lend its name nor allow its identity to be used by any individual, firm, association, or corporation in the operating or advertising of a raffle in which said nonprofit, tax-exempt organization is not directly and solely operating the raffle.

(5) No person shall pay consulting fees to any person for any services performed in relation to the operation or conduct of a raffle.

(6) A person who is a member of more than one nonprofit, tax-exempt organization shall be permitted to participate in the raffle operations of only two organizations of which such person is a member; provided, however, that such person shall not receive more than \$30.00 per day for assisting in the conduct of raffles regardless of whether such person assists both organizations in the same day.

(l) The sheriff is authorized to promulgate rules and regulations which the sheriff deems necessary for the proper administration and enforcement of this Code section which are not in conflict with any provision of this Code section.

(m) Any person who operates a raffle without a valid license issued by the sheriff as provided in this Code section commits the offense of commercial gambling as defined in Code Section 16-12-22 and, upon conviction thereof, shall be punished accordingly. Any person who knowingly aids, abets, or otherwise assists in the operation of a raffle for which a license has not been obtained as provided in this Code section similarly commits the offense of commercial gambling. Any person who violates any other provision of this Code section shall be guilty of a misdemeanor of a high and aggravated nature. Any person who commits any such violation after having previously been convicted of any violations of this Code section shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years or by a fine not to exceed \$10,000.00, or both. (Code 1981, § 16-12-22.1, enacted by Ga. L. 1995, p. 832, § 2; Ga. L. 1996, p. 794, §§ 1, 2; Ga. L. 2005, p. 1030, § 14/SB 55; Ga. L. 2007, p. 47, § 16/SB 103; Ga. L. 2008, p. 898, § 1/HB 1151.)

Editor's notes. — Ga. L. 2008, p. 898, § 13, not codified by the General Assembly, provides that the amendment to this

Code section shall be applicable to all taxable years beginning on or after January 1, 2008.

16-12-23. Keeping a gambling place.

(a) A person who knowingly permits any real estate, building, room, tent, vehicle, boat, or other property whatsoever owned by him or under his control to be used as a gambling place or who rents or lets any such property with a view or expectation that it be so used commits the offense of keeping a gambling place.

(b) A person who commits the offense of keeping a gambling place shall be guilty of a misdemeanor of a high and aggravated nature. (Laws 1833, Cobb's 1851 Digest, p. 815; Code 1863, § 4423; Ga. L. 1865-66, p. 233, § 2; Code 1868, § 4464; Code 1873, § 4538; Code 1882, § 4538; Ga. L. 1884-85, p. 59, § 1; Penal Code 1895, § 398; Penal Code 1910, §§ 389, 390; Code 1933, §§ 26-6401, 26-6402; Code 1933, § 26-2704, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1970, p. 236, § 7.)

Law reviews. — For note discussing organized crime in Georgia with respect to the application of state gambling laws,

and suggesting proposals for combatting organized crime, see 7 Ga. St. B.J. 124 (1970).

JUDICIAL DECISIONS

Purpose of section. — Former Penal Code 1895, § 398 was designed to prevent corruption of morals and is aimed against houses encouraging gambling. *Thrower v. State*, 117 Ga. 753, 45 S.E. 126 (1903) (see O.C.G.A. § 16-12-23).

In prohibiting a gaming house or a gaming place, it is intended to prevent the maintenance of a place at which persons gather for purpose of hazarding and betting money, whether subject matter of a single bet is or is not made penal. *Gullatt v. State ex rel. Collins*, 169 Ga. 538, 150 S.E. 825 (1929); *Friedman v. State*, 64 Ga. App. 405, 13 S.E.2d 467 (1941).

Section is aimed only at place. — Keeping of a gaming house or gaming place was a separate, well-defined offense, and entirely independent of criminality of betting carried on therein. Former Penal Code 1910, §§ 389, 390 was aimed at the place, not at players, not at game, nor at subject matter of wager. *Gullatt v. State ex rel. Collins*, 169 Ga. 538, 150 S.E. 825 (1929) (see O.C.G.A. § 16-12-23).

Maintenance of a gaming house or a gaming place is a public nuisance. *Gullatt v. State ex rel. Collins*, 169 Ga. 538, 150 S.E. 825 (1929).

"Place" defined. *Thrower v. City of Atlanta*, 124 Ga. 1, 52 S.E. 76, 110 Am. St. R. 147, 4 Ann. Cas. 1 (1905).

One may be acquitted of gambling yet convicted of operating a gambling house. — Gambling is one thing and operating a gambling house is a kindred but entirely different thing; and different evidence is required to convict of these separate offenses. No absurdity or repugnancy is created by acquittal of gambling and conviction of operating a gambling house. *McGahee v. State*, 133 Ga. App. 964, 213 S.E.2d 91 (1975).

One may be guilty of operating a gambling house without participating in actual gambling. *Miller v. State*, 48 Ga. App. 786, 173 S.E. 491 (1934).

Proof of defendant's mental state may be inferred. *Rivers v. State*, 118 Ga. 42, 44 S.E. 859 (1903); *Bashinski v. State*,

122 Ga. 164, 50 S.E. 54 (1905); Bashinski v. State, 123 Ga. 508, 51 S.E. 499 (1905).

Attendant circumstances may show true character of house. Bell v. State, 92 Ga. 49, 18 S.E. 186 (1893); Bluhakis v. State, 18 Ga. App. 112, 88 S.E. 911 (1916).

Proof of single act of gaming is insufficient. White v. State, 115 Ga. 570, 41 S.E. 986 (1902).

Purpose for permitting game is immaterial. Alexander v. City of Atlanta, 13 Ga. App. 354, 79 S.E. 177 (1913).

Betting on a horse race is gaming. Gullatt v. State ex rel. Collins, 169 Ga. 538, 150 S.E. 825 (1929).

Betting on a dog fight is gaming. Gullatt v. State ex rel. Collins, 169 Ga. 538, 150 S.E. 825 (1929).

House or place for purpose of permitting gaming on dog races is a gaming house. Gullatt v. State ex rel. Collins, 169 Ga. 538, 150 S.E. 825 (1929).

Bucket shop as violation of former Penal Code 1895, § 398. Anderson v. State, 2 Ga. App. 1, 58 S.E. 401 (1907) (see O.C.G.A. § 16-12-23).

House where race horse bets placed violated former Penal Code 1895. Thrower v. State, 117 Ga. 753, 45 S.E. 126 (1903) (see O.C.G.A. § 16-12-23).

One greeting people as people enter gaming house violates section. — When one is indicted for operation of a gaming house, a misdemeanor, and the state's evidence discloses operation of a large gambling establishment having numbers of employees, a statement made by the defendant that the defendant was a greeter, working in the club to greet folks coming in amounts to a confession of guilt of the crime charged. Richards v. State, 56 Ga. App. 377, 192 S.E. 632 (1937).

Liability of wife residing in gambling house. — See Bell v. State, 92 Ga. 49, 18 S.E. 186 (1893).

Cited in United States v. Crockett, 506 F.2d 759 (5th Cir. 1975); United States v. Hawes, 529 F.2d 472 (5th Cir. 1976); Dowdy v. State, 150 Ga. App. 137, 257 S.E.2d 41 (1979); Cox v. State, 160 Ga. App. 199, 286 S.E.2d 482 (1981); Evans v. State, 252 Ga. 312, 314 S.E.2d 421 (1984).

RESEARCH REFERENCES

Am. Jur. 2d. — 24 Am. Jur. 2d, Disorderly Houses, § 1 et seq. 38 Am. Jur. 2d, Gambling, § 91 et seq.

C.J.S. — 38 C.J.S., Gaming, § 150 et seq.

ALR. — Connection with place where

gaming is carried on which will render one guilty as keeper thereof, 15 ALR 1202.

Punchboard as a lottery, 163 ALR 1279.

Gambling in private residence as prohibited or permitted by anti-gambling laws, 27 ALR3d 1074.

16-12-24. Possession, manufacture, or transfer of gambling device or parts; possession of antique slot machines.

(a) A person who knowingly owns, manufactures, transfers commercially, or possesses any device which he knows is designed for gambling purposes or anything which he knows is designed as a subassembly or essential part of such device is guilty of a misdemeanor of a high and aggravated nature.

(b)(1) As used in this subsection, the term:

(A) "Antique slot machine" means a coin operated, nonelectronic mechanical gambling device that pays off according to the matching of symbols on wheels spun by a handle and was manufactured in its entirety, except for identical replacement parts, prior to January 1, 1950.

(B) "Conviction" includes a plea of nolo contendere to a felony.

(2) It shall be a defense to any action or prosecution under this Code section for possession of a gambling device that the device is an antique slot machine and that said device was not being used for gambling; provided, however, the defense shall not be available to any person who has been convicted of a felony in this or any other state or under federal law and provided, further, that this defense shall not be available if the antique slot machine is on the premises of a private or public club or in an establishment where alcoholic beverages are sold.

(3) Any antique slot machine seized as a result of a violation of this Code section shall be contraband and subject to seizure and destruction as provided in Code Section 16-12-30. An antique slot machine seized for a violation of this Code section shall not be destroyed, altered, or sold until the owner has been afforded a reasonable opportunity to present evidence that the device was not operated for unlawful gambling or in violation of this Code section. If the court determines that the device is an antique slot machine and was not operated or possessed in violation of this or any other Code section, such device shall be returned to its owner. (Code 1933, § 26-2707, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1969, p. 857, §§ 1, 2; Ga. L. 1970, p. 236, § 9; Ga. L. 1985, p. 888, § 1.)

Law reviews. — For note discussing organized crime in Georgia with respect to the application of state gambling laws,

and suggesting proposals for combatting organized crime, see 7 Ga. St. B.J. 124 (1970).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 26-6502, as it read prior to revision of the title by Ga. L. 1968, p. 1249, are included in the annotations for this Code section.

Possession of gambling devices and equipment and operating a gambling place are separate offenses. — Although arising from the same transaction, offenses of possession of gambling devices and equipment, and commercial gambling by operating a gambling place, are separate and distinct. *Baxter v. State*, 134 Ga. App. 286, 214 S.E.2d 578, cert. denied, 423 U.S. 895, 96 S. Ct. 194, 46 L. Ed. 2d 127 (1975).

Slot machine as gambling device. — An apparatus, known as a "slot machine," by which a person depositing money therein may, by chance, get directly or indirectly money or articles of value worth

either more or less than the money deposited, falls within the purview of former Code 1933, § 26-6502, and cannot be treated as one kept only for amusement. *Elder v. Camp*, 193 Ga. 320, 18 S.E.2d 622 (1942) (decided under former Code 1933, § 26-6502) (see O.C.G.A. § 16-12-24).

Showing possession of gambling device without also showing actual operation. — Mere keeping of device for hazarding of money being prohibited by law, and a device so kept being contraband, it is unnecessary in showing illegality of the device, to allege and prove a further violation of law by its actual operation. *Elder v. Camp*, 193 Ga. 320, 18 S.E.2d 622 (1942) (decided under former Code 1933, § 26-6502).

Mere keeping of a device for hazarding of money being prohibited by law, and a device so kept being contraband, it is unnecessary, in showing illegality of the

device, to allege and prove a further violation of law by its actual operation. *Miller v. State*, 94 Ga. App. 259, 94 S.E.2d 120 (1956) (decided under former Code 1933, § 26-6502).

Search warrant was based on probable cause because Clayton County investigators purchased an illegal video poker machine from a subject in Clayton County, who said that the machine was obtained from a particular address in DeKalb County, and both DeKalb and Clayton investigators observed "several other illegal video poker machines" at that address; while the investigators could not tell from looking at the machines whether the machines were legal or not, the test was only whether the evidence established a fair probability that contraband would be found. *Jones v. State*, 276 Ga. App. 810, 625 S.E.2d 4 (2005).

Owner of seized gambling articles cannot bring action in trover. — When a sheriff finds articles kept for the purpose of gambling, an action of trover by the owner against the sheriff for their recovery will not lie, since courts are created for the upholding of law and of morals, and will decline to allow their processes to be used to further maintenance of crimes and public evils, by assisting or protecting such an owner in recovering the implements of crime or illegal paraphernalia. *Elder v. Camp*, 193 Ga. 320, 18 S.E.2d 622 (1942) (decided under former Code 1933, § 26-6502).

Cited in *Osbourne v. State*, 128 Ga. App. 81, 195 S.E.2d 662 (1973); *United States v. Hawes*, 529 F.2d 472 (5th Cir. 1976); *Total Vending Serv., Inc. v. Gwinnett County*, 153 Ga. App. 109, 264 S.E.2d 574 (1980).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, § 26-6502 are included in the annotations for this Code section.

Gambling in vessel beyond state's three-mile limit. — The 1992 amendments to the Johnson Act (15 U.S.C. § 1175) have preempted O.C.G.A. § 16-12-24's prohibition on the possession of gambling devices as applied to foreign or U.S. registered vessels where all gambling activities take place beyond the state's three-mile territorial limits, where the gambling devices remain on board when the vessel is in a Georgia port. 1992 Op. Att'y Gen. No. U92-20.

Electronic slot machines are gambling devices per se; they are contra-

band; they can be seized and destroyed as contraband; possession of such devices is a crime; no demonstration of operation of any such device is necessary antecedent to its seizure, nor is any demonstration necessary to establish basis of criminal prosecution for possession of said device. 1971 Op. Att'y Gen. No. 71-167.

Electronic games that are entirely games of chance are gambling devices per se. Electronic games which are not games of skill, and which are worthless except as games of chance, are gambling devices per se, and ownership, manufacture, transfer commercially, or possession of such devices within this state is prohibited. 1970 Op. Att'y Gen. No. U70-202.

RESEARCH REFERENCES

Am. Jur. 2d. — 38 Am. Jur. 2d, Gambling, § 64 et seq.

C.J.S. — 38 C.J.S., Gaming, §§ 155, 156.

ALR. — Coin-operated or slot machines as lottery, 101 ALR 1126.

Possession of gambling device as offense not requiring showing that device was

used for gambling or kept for gambling purposes, 162 ALR 1188.

Punchboard as a lottery, 163 ALR 1279.

Paraphernalia or appliances used for recording gambling transactions or receiving or furnishing gambling information as gaming "devices" within criminal statute or ordinance, 1 ALR3d 726.

Validity of criminal legislation making possession of gambling or lottery devices or paraphernalia presumptive or prima facie evidence of other incriminating facts, 17 ALR3d 491.

Construction and application of state or municipal enactments relating to policy or numbers games, 70 ALR3d 897.

16-12-25. Solicitation of another to gamble with intent to defraud or deceive.

(a) Any person who solicits another person to commit any of the following acts with the intent to defraud or deceive such person on or adjacent to the premises of any business operated for pecuniary gain shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years:

(1) Keeps, maintains, employs, or carries on a game for the hazarding of money or other thing of value;

(2) Permits the playing for money or other thing of value of a game or device for the hazarding of money or other thing of value;

(3) Keeps or employs a device or equipment for the purpose of carrying on or operating a game or device for the hazarding of money or other thing of value;

(4) Permits the betting or wagering of money or other thing of value;

(5) Sells or offers to sell to a person a ticket number or combination or chance or anything representing a chance in a lottery or other similar scheme;

(6) Keeps, maintains, employs, or carries on a lottery or scheme or device for the hazarding of money or other thing of value;

(7) Keeps, maintains, or employs a lottery ticket, lottery book, lottery ribbon, or other article used in keeping, maintaining, or carrying on a lottery or other scheme, game, or device for the hazarding of money or other thing of value;

(8) Solicits a person to engage in a game or to operate a device for the hazarding of money or other thing of value; or

(9) Solicits a person to engage in a lottery or other scheme or device for the hazarding of money or other thing of value.

(b) This Code section is cumulative of and supplemental to any laws making any of the activities prohibited by this Code section unlawful and punishable as a misdemeanor; and nothing in this Code section shall be construed to repeal, amend, alter, or supersede any such laws. (Ga. L. 1968, p. 1198, §§ 1, 2.)

RESEARCH REFERENCES

C.J.S. — 38 C.J.S., Gaming, § 172.

ALR. — Criminal conspiracies as to gambling, 91 ALR2d 1148.

Gambling in private residence as prohibited or permitted by anti-gambling laws, 27 ALR3d 1074.

16-12-26. Advertising commercial gambling.

(a) A person who knowingly prints, publishes, or advertises any lottery or other scheme for commercial gambling or who knowingly prints or publishes any lottery ticket, policy ticket, or other similar device designed to serve as evidence of participation in a lottery commits the offense of advertising commercial gambling.

(b) A person who commits the offense of advertising commercial gambling shall be guilty of a misdemeanor of a high and aggravated nature. (Code 1933, § 26-2705, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1970, p. 236, § 8.)

Cross references. — Constitutional guarantee of free speech and press, Ga. Const. 1983, Art. I, Sec. I, Para. V.

Law reviews. — For note discussing organized crime in Georgia with respect to

the application of state gambling laws, and suggesting proposals for combatting organized crime, see 7 Ga. St. B.J. 124 (1970).

JUDICIAL DECISIONS

Cited in *Dennard v. State*, 265 Ga. App. 229, 593 S.E.2d 694 (2004).

OPINIONS OF THE ATTORNEY GENERAL

Continued advertisement of a sweepstakes where a player can determine if the player has the “winning number” by calling a “dial-it” number consti-

tutes advertising commercial gambling in violation of O.C.G.A. § 16-12-26. 1984 Op. Att’y Gen. No. 84-83.

RESEARCH REFERENCES

ALR. — Paraphernalia or appliances used for recording gambling transactions or receiving or furnishing gambling information as gaming “devices” within criminal statute or ordinance, 1 ALR3d 726.

Promotion schemes of retail stores as

criminal offense under antigambling law, 29 ALR3d 888.

Construction and application of state or municipal enactments relating to policy or numbers games, 70 ALR3d 879.

16-12-27. Advertisement or solicitation for participation in lotteries.

(a) It shall be unlawful for any person, partnership, firm, corporation, or other entity to sell, distribute, televise, broadcast, or dissemi-

nate any advertisement, television or radio commercial, or any book, magazine, periodical, newspaper, or other written or printed matter containing an advertisement or solicitation for participation in any lottery declared to be unlawful by the laws of this state unless such advertisement, commercial, or solicitation contains or includes the words "void in Georgia" printed or spoken so as to be clearly legible or audible to persons viewing or hearing such advertisement, commercial, or solicitation.

(b) Any person, partnership, firm, corporation, or other entity violating subsection (a) of this Code section shall be guilty of a misdemeanor. (Ga. L. 1889, p. 187, § 1; Penal Code 1895, § 410; Penal Code 1910, § 401; Code 1933, § 26-6504; Code 1933, § 26-2705.1, enacted by Ga. L. 1975, p. 1072, § 1.)

Cross references. — Constitutional guarantee of free speech and press, U.S. Const., amend. 1, Ga. Const. 1983, Art. I, Sec. I, Para. V.

OPINIONS OF THE ATTORNEY GENERAL

Continued advertisement and solicitation for participation in a sweepstakes where a player can determine if the player has the "winning number" by calling a "dial-it" number constitutes solicitation for participation in lotteries in violation of O.C.G.A. § 16-12-27. 1984 Op. Att'y Gen. No. 84-83.

RESEARCH REFERENCES

ALR. — Punchboard as a lottery, 163 ALR 1279. Validity of pyramid distribution plan, 54 ALR3d 217.

16-12-28. Communicating gambling information.

(a) A person who knowingly communicates information as to bets, betting odds, or changes in betting odds or who knowingly installs or maintains equipment for the transmission or receipt of such information with the intent to further gambling commits the offense of communicating gambling information.

(b) A person who commits the offense of communicating gambling information, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years or by a fine not to exceed \$5,000.00, or both. (Code 1933, § 26-2706, enacted by Ga. L. 1968, p. 1249, § 1.)

Cross references. — Constitutional guarantee of free speech and press, Ga. Const. 1983, Art. I, Sec. I, Para. V. For note discussing organized crime in Georgia with respect to the application of state gambling laws, and suggesting proposals for combatting organized crime, see 7 Ga. St. B.J. 124 (1970).

Law reviews. — For article, "A Comprehensive Analysis of Georgia RICO," see 9 Georgia St. U.L. Rev. 537 (1993).

JUDICIAL DECISIONS

Cited in *Cox v. State*, 160 Ga. App. 199, 286 S.E.2d 482 (1981); *Evans v. State*, 252 Ga. 312, 314 S.E.2d 421 (1984).

RESEARCH REFERENCES

Am. Jur. 2d. — 38 Am. Jur. 2d, Gambling, §§ 81, 97 et seq.

C.J.S. — 38 C.J.S., Gaming, § 176.

ALR. — Paraphernalia or appliances used for recording gambling transactions or receiving or furnishing gambling information as gaming “devices” within criminal statute or ordinance, 1 ALR3d 726.

Right or duty to refuse telephone, tele-

graph, or other wire service in aid of illegal gambling operations, 30 ALR3d 1143.

Validity, construction, and application of statute or ordinance prohibiting or regulating use of messenger services to place wagers in pari-mutuel pool, 78 ALR4th 483.

16-12-29. Competent witnesses.

On the trial of any person for violating Code Section 16-12-21, 16-12-22, 16-12-23, or 16-12-24, any other person who may have played and bet at the same time or table shall be a competent witness. (Laws 1833, Cobb’s 1851 Digest, pp. 815, 816; Code 1863, § 4428; Code 1868, § 4469; Code 1873, § 4545; Code 1882, § 4545; Penal Code 1895, § 404; Penal Code 1910, § 395; Code 1933, § 26-6407; Code 1933, § 26-9907, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1969, p. 857, § 15.)

Cross references. — Competency of witnesses generally, § 24-9-1 et seq.

Law reviews. — For note discussing organized crime in Georgia with respect to

the application of state gambling laws, and suggesting proposals for combatting organized crime, see 7 Ga. St. B.J. 124 (1970).

JUDICIAL DECISIONS

Cited in *Carter v. State*, 129 Ga. App. 536, 199 S.E.2d 925 (1973).

16-12-30. Seizure and destruction of gambling devices.

(a) Except as provided in subsection (b) of Code Section 16-12-24, every gambling device is declared to be contraband and subject to seizure and confiscation by any state or local authority within whose jurisdiction the same may be found.

(b) At such time as there shall be a final judgment entered in any case or cases in which a seized gambling device is necessary evidence or at such time as the state shall determine that the continued physical existence of the seized gambling device is no longer necessary, the same shall be turned over by that person having custody of the device to the

sheriff of the county wherein the device was confiscated. The sheriff shall within ten days after receiving the device destroy the same in the presence of the district attorney of the circuit in which such county is located and shall forward to the state revenue commissioner a certificate so stating which shall include the serial number of the device so destroyed. (Code 1933, § 26-2708, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1969, p. 857, § 13; Ga. L. 1985, p. 888, § 2.)

OPINIONS OF THE ATTORNEY GENERAL

Electronic slot machines are contraband and may be seized and destroyed. — Electronic slot machines are gambling devices per se; slot machines are contraband; slot machines can be seized and destroyed as contraband; possession of such devices is a crime; no demonstra-

tion of the operation of any such device is a necessary antecedent to the machine's seizure, nor is any demonstration necessary to establish the basis of a criminal prosecution for possession of that device. 1971 Op. Att'y Gen. No. 71-167.

RESEARCH REFERENCES

Am. Jur. 2d. — 38 Am. Jur. 2d, Gambling, § 132 et seq.

C.J.S. — 38 C.J.S., Gaming, § 123 et seq.

ALR. — Right to jury trial in case of seizure of property alleged to be illegally used, 17 ALR 568; 50 ALR 97.

Coin-operated or slot machines as lottery, 101 ALR 1126.

Gambling or lottery paraphernalia as subject of larceny, burglary, or robbery, 51 ALR2d 1396.

Lawfulness of seizure of property used in violation of law as prerequisite to forfeiture action or proceeding, 8 ALR3d 473.

Constitutionality of statutes providing for destruction of gambling devices, 14 ALR3d 366.

16-12-31. Seizure and disposition of funds or other things of value used for gambling.

Repealed by Ga. L. 1982, p. 2325, § 1, effective November 1, 1982.

Editor's notes. — This Code section was based on Ga. L. 1968, p. 1249, § 1.

For present provisions, see Code Section 16-12-32.

16-12-32. Seizure and disposition of property used in or derived from violation of article.

(a) As used in this Code section, "property" means any personal property of any type, tangible or intangible, including but not limited to vehicles, conveyances, aircraft, watercraft, funds, other things of value or choses in action or any interest in such property, but shall not include a gambling device subject to seizure and destruction under Code Section 16-12-30.

(b) All property used in, intended for use in, used to facilitate, or derived from or realized through a violation of this article or which is located within any gambling place or within any vehicle or other

conveyance used to transport any gambling device, any subassembly or essential part thereof, card, stub, ticket, check, funds, things of value, or other device designed to facilitate participation in any lottery is declared to be contraband and may be seized and forfeited as provided in this Code section.

(c) Any such property shall be seized by any peace officer who, within ten days after the seizure of such property, shall report the same to the district attorney of the superior court having jurisdiction in the county where the seizure was made.

(d) Within 30 days from the date he receives notice of such seizure, the district attorney of said judicial circuit shall cause to be filed in the superior court of the county in which the property was seized an action against the property so seized and any and all persons having an interest in or right affected by the seizure or sale of such property.

(e) A copy of the action shall be served upon the person or persons having custody or possession of such property at the time of seizure, and, if known, upon any owner, lessee, and any person having a duly recorded security interest in or lien upon such property at the time of seizure. If the owner or lessee is unknown or resides out of the state or departs the state or cannot after due diligence be found within the state or conceals himself so as to avoid service, notice of such proceedings shall be published once a week for two consecutive weeks in the newspaper in which sheriff's advertisements are published. Such publication shall be deemed notice to any and all persons having an interest in or right affected by such proceeding and any sale of the property resulting therefrom but shall not constitute notice to any person having a duly recorded security interest in or lien upon such property and required to be served under this subsection unless that person is unknown or resides out of the state or departs the state or cannot after due diligence be found within the state or conceals himself to avoid service.

(f) If no defense is filed within 30 days after the service of a copy of the action or the last publication required under subsection (e) of this Code section, judgment by default shall be entered by the court at chambers, otherwise the case shall proceed as other civil cases in said court.

(g) Should it appear that any person filing a defense in the action knew, or by the exercise of ordinary care should have known, that the property was used in violation of this Code section, the same shall be sold by order of the court after such advertisement as the court shall direct, and such person shall have no claim upon the property or the proceeds from the sale thereof.

(h) Except as otherwise provided in this Code section, property forfeited pursuant to this subsection shall be disposed of by order of the court as follows:

(1) Upon application of the seizing law enforcement agency or any other law enforcement agency of state, county, or municipal government, the court may permit the agency to retain the property for official use in law enforcement work; or

(2) The court may sell that which is not required to be destroyed by law and which is not harmful to the public, and the proceeds of such sale shall be used for payment of all proper expenses of the forfeiture and sale including, but not limited to, the expenses of seizure, maintenance of custody, advertising, and court costs.

The remainder of the proceeds of a sale of forfeited property, after payment of these expenses, shall be paid into the general fund of the county. (Ga. L. 1945, p. 351, § 2; Code 1933, §§ 26-2709, 26-2710, enacted by Ga. L. 1968, p. 1249, § 1; Code 1981, §§ 16-12-31, 16-12-32; Ga. L. 1982, p. 2325, § 1; Ga. L. 1983, p. 3, § 13; Ga. L. 1990, p. 587, § 1.)

Law reviews. — For article, “Criminal Civil Forfeiture Debate,” see 10 Georgia Forfeiture: An Appropriate Solution to the St. U.L. Rev. 241 (1994).

JUDICIAL DECISIONS

Constitutionality. — O.C.G.A. § 16-12-32(b) was not unconstitutionally vague as applied to gambling club patrons whose funds were seized when police raided a club. *Izzo v. State*, 257 Ga. 109, 356 S.E.2d 204 (1987).

Cash admittedly from gambling. — An individual’s uncorroborated admission to a police officer that cash the individual voluntarily took from the individual’s pocket the individual had earned gambling was sufficient to support forfeiture. *Hall v. State*, 226 Ga. App. 486, 486 S.E.2d 710 (1997).

Failure to prove that seizure was reported within time period allowed by statute. — Trial court erred in ordering a forfeiture because the state did not prove that the seizure of money used in commercial gambling was reported to the district attorney within the time period allowed by O.C.G.A. § 16-12-32(d); as the state failed to present evidence of the notice date, there was no evidence that the state complied with O.C.G.A.

§ 16-12-32(d). *Ridley v. State*, 253 Ga. App. 896, 560 S.E.2d 769 (2002).

Prior conviction not required. — Showing that the owner or user of the property sought to be condemned was convicted of a crime is not required. Defendant should not be faced with the Hobson’s choice of leaving the petition unanswered, thereby conceding the condemnation by default, or answering and having the defendant’s first offender record used against the defendant. *Jones v. State*, 212 Ga. App. 682, 442 S.E.2d 880 (1994).

Van used to transport fighting dogs may be condemned. — Van used to transport two fighting dogs to the scene of dogfights and which was thus used to facilitate a dogfight in violation of O.C.G.A. § 16-12-37 may be condemned as provided in O.C.G.A. § 16-12-32. *Macon Auto Cleaners v. State*, 175 Ga. App. 13, 332 S.E.2d 324 (1985).

Determining if penalty is proportionate to offense. — In determining

whether forfeiture of property was constitutionally permissible, the court failed to address whether the harshness of the penalty was proportional to the gravity of the offense giving rise to the forfeiture; therefore, remand was required for determination of that issue. *Mayes v. State*, 230 Ga. App. 172, 495 S.E.2d 640 (1998).

Cited in *McFarland v. State*, 134 Ga. App. 470, 214 S.E.2d 721 (1975); *State v. Walls*, 202 Ga. App. 899, 415 S.E.2d 921 (1992); *Wilson v. State*, 206 Ga. App. 599, 426 S.E.2d 192 (1992); *Griffin v. State*, 211 Ga. App. 750, 440 S.E.2d 483 (1994).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, §§ 26-6507 and 26-6508 are included in the annotations for this Code section.

Manufacturing gambling devices. — If gambling devices are contraband when transported, it follows logically that they may not be manufactured; thus, companies manufacturing gambling devices may not be established in the State of Georgia. 1963-65 Op. Att'y Gen. p. 319 (decided under former Code 1933, § 26-6507).

It is illegal to transport gambling devices within this state in intrastate commerce; however, this state does not attempt to exercise jurisdiction over the transportation of gambling devices in interstate commerce. 1960-61 Op. Att'y Gen. p. 113 (decided under former Code 1933, §§ 26-6507, 26-6508).

Office of the district attorney is not a "law enforcement agency" within the meaning of O.C.G.A. § 16-12-32(h)(1). 1985 Op. Att'y Gen. No. U85-22.

RESEARCH REFERENCES

Am. Jur. 2d. — 16B Am. Jur. 2d, Constitutional Law, §§ 955, 961, 983 et seq. 38 Am. Jur. 2d, Gambling, § 134 et seq. 68 Am. Jur. 2d, Searches and Seizures, § 312 et seq.

C.J.S. — 38 C.J.S., Gaming, § 110 et seq.

ALR. — Right to jury trial in case of seizure of property alleged to be illegally used, 17 ALR 568; 50 ALR 97.

Lawfulness of seizure of property used in violation of law as prerequisite to forfeiture action or proceeding, 8 ALR3d 473.

16-12-33. Bribery of a contestant.

A person who gives, offers, or promises any reward, money, or other thing of value to anyone who participates or expects to participate in any amateur or professional athletic contest, sporting event, or exhibition or to any coach, trainer, manager or official in such athletic contest, sporting event, or exhibition with intent to influence such person to lose, try to lose, or cause to be lost or to affect the margin of victory or defeat in such athletic contest, sporting event, or exhibition commits the offense of bribery of a contestant and, upon conviction thereof, shall be punished by a fine of not less than \$1,000.00 nor more than \$5,000.00 or by imprisonment for not less than one nor more than five years, or both. (Ga. L. 1947, p. 1139, § 2; Ga. L. 1952, p. 303, § 1; Code 1933, § 26-2711, enacted by Ga. L. 1968, p. 1249, § 1.)

Law reviews. — For article, “A Comprehensive Analysis of Georgia RICO,” see 9 Georgia St. U.L. Rev. 537 (1993).

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Bribery, § 15.

ALR. — Admissibility, in prosecution for bribery or accepting bribes, of evidence tending to show the commission of other bribery or acceptance of bribe, 20 ALR2d 1012.

Bribery in athletic contests, 49 ALR2d 1234.

Recovery of money paid, or property transferred, as a bribe, 60 ALR2d 1273.

16-12-34. Soliciting or accepting a bribe to influence outcome of athletic contests, sporting events, or exhibitions.

A person participating or expecting to participate or any coach, trainer, manager, or official in any amateur or professional athletic contest, sporting event, or exhibition who solicits or accepts any reward, money, or other thing of value with the intent, understanding, or agreement that it influence him to lose, try to lose, or cause to be lost or to limit the margin of victory or defeat in such athletic contest, sporting event, or exhibition by failing to exert his best efforts or to exercise his best judgment commits the offense of soliciting or accepting a bribe and, upon conviction thereof, shall be punished by a fine of not less than \$1,000.00 nor more than \$5,000.00 or by imprisonment for not less than one nor more than five years, or both. (Ga. L. 1947, p. 1139, § 3; Ga. L. 1952, p. 303, § 1; Code 1933, § 26-2712, enacted by Ga. L. 1968, p. 1249, § 1.)

Law reviews. — For article, “A Comprehensive Analysis of Georgia RICO,” see 9 Georgia St. U.L. Rev. 537 (1993).

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Bribery, § 15.

ALR. — Bribery in athletic contests, 49 ALR2d 1234.

Recovery in tort for wrongful interference with chance to win game, sporting event, or contest, 85 ALR4th 1048.

16-12-35. Applicability of part.

(a) As used in this Code section, the term “some skill” means any presence of the following factors, alone or in combination with one another:

- (1) A learned power of doing a thing competently;
- (2) A particular craft, art, ability, strategy, or tactic;

- (3) A developed or acquired aptitude or ability;
- (4) A coordinated set of actions, including, but not limited to, eye-hand coordination;
- (5) Dexterity, fluency, or coordination in the execution of learned physical or mental tasks or both;
- (6) Technical proficiency or expertise;
- (7) Development or implementation of strategy or tactics in order to achieve a goal; or
- (8) Knowledge of the means or methods of accomplishing a task.

The term some skill refers to a particular craft, coordinated effort, art, ability, strategy, or tactic employed by the player to affect in some way the outcome of the game played on a bona fide coin operated amusement machine as defined in paragraph (2) of Code Section 48-17-1. If a player can take no action to affect the outcome of the game, the bona fide coin operated amusement machine does not meet the "some skill" requirement of this Code section.

(b) Nothing in this part shall apply to a coin operated game or device designed and manufactured for bona fide amusement purposes only which may by application of some skill entitle the player to earn replays of the game or device at no additional cost and to discharge the accumulated free replays only by reactivating the game or device for each accumulated free replay or by reactivating the game or device for a portion or all of the accumulated free plays in a single play. This subsection shall not apply, however, to any game or device classified by the United States government as requiring a federal gaming tax stamp under applicable provisions of the Internal Revenue Code or any item described as a gambling device in subparagraph (B), (C), or (D) of paragraph (2) of Code Section 16-12-20.

(c)(1) Nothing in this part shall apply to a crane game machine or device meeting the requirements of paragraph (2) of this subsection.

(2) A crane game machine or device acceptable for the purposes of paragraph (1) of this subsection shall meet the following requirements:

(A) The machine or device must be designed and manufactured only for bona fide amusement purposes and must involve at least some skill in its operation;

(B) The machine or device must reward a winning player exclusively with free replays or merchandise contained within the machine itself and such merchandise must be limited to noncash merchandise, prizes, toys, gift certificates, or novelties, each of

which has a wholesale value not exceeding \$5.00. A player may be rewarded with both free replays and noncash merchandise, prizes, toys, or novelties for a single play of the game or device as provided in this Code section;

(C) The player of the machine or device must be able to control the timing of the use of the claw or grasping device to attempt to pick up or grasp a prize, toy, or novelty;

(D) The player of the machine or device must be made aware of the total time which the machine or device allows during a game for the player to maneuver the claw or grasping device into a position to attempt to pick up or grasp a prize, toy, or novelty;

(E) The claw or grasping device must not be of a size, design, or shape that prohibits picking up or grasping a prize, toy, or novelty contained within the machine or device; and

(F) The machine or device must not be classified by the United States government as requiring a federal gaming stamp under applicable provisions of the Internal Revenue Code.

(d)(1) Nothing in this part shall apply to a coin operated game or device designed and manufactured only for bona fide amusement purposes which involves some skill in its operation if it rewards the player exclusively with:

(A) Free replays;

(B) Merchandise limited to noncash merchandise, prizes, toys, gift certificates, or novelties, each of which has a wholesale value of not more than \$5.00 received for a single play of the game or device;

(C) Points, tokens, vouchers, tickets, or other evidence of winnings which may be exchanged for rewards set out in subparagraph (A) of this paragraph or subparagraph (B) of this paragraph or a combination of rewards set out in subparagraph (A) and subparagraph (B) of this paragraph; or

(D) Any combination of rewards set out in two or more of subparagraph (A), (B), or (C) of this paragraph.

This subsection shall not apply, however, to any game or device classified by the United States government as requiring a federal gaming stamp under applicable provisions of the Internal Revenue Code or any item described as a gambling device in subparagraph (B), (C), or (D) of paragraph (2) of Code Section 16-12-20.

(2) A player of bona fide coin operated amusement games or devices described in paragraph (1) of this subsection may accumulate winnings for the successful play of such bona fide coin operated

amusement games or devices through tokens, vouchers, points, or tickets. Points may be accrued on the machine or device. A player may carry over points on one play to subsequent plays. A player may redeem accumulated tokens, vouchers, or tickets for noncash merchandise, prizes, toys, gift certificates, or novelties so long as the amount of tokens, vouchers, or tickets received does not exceed \$5.00 for a single play.

(e) Any person who gives to any other person money for free replays on coin operated games or devices described in subsection (b), (c), or (d) of this Code section shall be guilty of a misdemeanor.

(f) Any person owning or possessing an amusement game or device described in subsection (c) or (d) of this Code section or any person employed by or acting on behalf of any such person who gives to any other person money for any noncash merchandise, prize, toy, gift certificate, or novelty received as a reward in playing any such amusement game or device shall be guilty of a misdemeanor.

(g) Any person owning or possessing an amusement game or device described in subsection (b), (c), or (d) of this Code section or any person employed by or acting on behalf of any such person who gives to any other person money as a reward for the successful play or winning of any such amusement game or device shall be guilty of a misdemeanor of a high and aggravated nature.

(h) Any gift certificates, tokens, vouchers, tickets, or other evidence of winnings awarded under subsection (c) or (d) of this Code section must be redeemable only at the premises on which the game or device is located. It shall be unlawful for any person to provide to any other person as a reward for play on any such game or device any gift certificate, token, voucher, ticket, or other evidence of winning which is redeemable or exchangeable for any thing of value at any other premises. It shall be unlawful for any person at any premises other than those on which the game or device is located to give any thing of value to any other person for any gift certificate, token, voucher, ticket, or other evidence of winning received by such other person from play on such game or device. Any person who violates this subsection shall be guilty of a misdemeanor of a high and aggravated nature.

(i) The merchandise, prizes, toys, gift certificates, novelties, or rewards which may be awarded under subsection (c) or (d) of this Code section may not include or be redeemable or exchangeable for any firearms, alcohol, or tobacco or any lottery ticket or other item enabling participation in any lottery. Any person who violates this subsection shall be guilty of a misdemeanor of a high and aggravated nature.

(j) Any other laws to the contrary notwithstanding, this part shall not be applicable to the manufacturing, processing, selling, possessing,

or transporting of any printed materials, equipment, devices, or other materials used or designated for use in a legally authorized lottery nor shall it be applicable to the manufacturing, processing, selling, possessing, or transporting of any gaming equipment, devices, or other materials used or designated for use only in jurisdictions in which the use of such items is legal. This part shall in no way prohibit communications between persons in this state and persons involved with such legal lotteries or gaming devices relative to such printed materials, equipment, devices, or other materials or prohibit demonstrations of same within this state. (Code 1933, § 26-2713, enacted by Ga. L. 1976, p. 1158, § 1; Ga. L. 1978, p. 1779, § 1; Ga. L. 1985, p. 886, § 1; Ga. L. 1991, p. 1396, § 1; Ga. L. 1991, p. 1398, § 1; Ga. L. 1992, p. 1489, § 1; Ga. L. 1996, p. 309, § 1; Ga. L. 1997, p. 689, § 1; Ga. L. 1998, p. 563, § 1; Ga. L. 1999, p. 1224, § 1; Ga. L. 2001, Ex. Sess., p. 312, § 2; Ga. L. 2007, p. 47, § 16/SB 103.)

Cross references. — Restrictions on percent of income from coin operated machines, § 48-17-15.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, a semicolon was substituted for a period at the end of subparagraph (c)(2)(B).

Pursuant to Code Section 28-9-5, in 1999, “subparagraph” was substituted for “subparagraphs” in subparagraph (d)(1)(D) and “subsection” was substituted for “subsections” in subsection (e).

Editor’s notes. — Ga. L. 2001, Ex. Sess., p. 312, § 4, not codified by the General Assembly, provides that: “This Act is not intended to, and should not be construed to, affect the legality of the repair, transport, possession, or use of otherwise prohibited gambling devices on maritime vessels within the jurisdiction of the State of Georgia. To the extent that such repair, transport, possession, or use was lawful prior to the enactment of this Act, it shall not be prohibited by this Act; and to the extent that such repair, trans-

port, possession, or use was prohibited prior to the enactment of this Act, it shall not be permitted by this Act.”

Ga. L. 2001, Ex. Sess., p. 312, § 5, not codified by the General Assembly, provides that: “During the period beginning January 1, 2002, and ending June 30, 2002, it shall not be unlawful to possess in this state a machine or device described in subparagraph (B), (C), or (D) of paragraph (2) of Code Section 16-12-20, if: (1) Such machine is not in use; (2) Such machine is in transit to a storage facility or in a storage facility, which said storage facility is a secured facility and no part of same is accessible by anyone other than employees of said facility or employees of the owner of said machine; and (3) Such machine is not located in a place which is open to the public and is not located in a private club.”

U.S. Code. — The provisions of the Internal Revenue Code related to the wagering tax stamp are codified at 26 U.S.C. § 4901.

JUDICIAL DECISIONS

O.C.G.A. § 16-12-35 decriminalizes certain pinball machines because they are no longer to be considered as gambling devices. *Total Vending Servs., Inc. v. Gwinnett County*, 157 Ga. App. 28, 276 S.E.2d 89 (1981).

O.C.G.A. § 16-12-35 deals with pinball machines in isolated context of

criminal gambling laws of Georgia. *Total Vending Servs., Inc. v. Gwinnett County*, 157 Ga. App. 28, 276 S.E.2d 89 (1981).

Gambling device. — In Georgia, O.C.G.A. § 16-12-35 (d)(2) did not require success in every single play of the game in order for a player to carry over and re-

deem points accumulated during an earlier successful play of the machine or device. As such, the trial court did not err by using the long-established common meaning of the term "slot machine," i.e., an apparatus by which a person depositing money therein could, by chance, get

directly or indirectly money or articles of value worth either more or less than the money deposited. *Ultra Telecom, Inc. v. State*, 288 Ga. 65, 701 S.E.2d 144 (2010).

Cited in *Total Vending Serv., Inc. v. Gwinnett County*, 153 Ga. App. 109, 264 S.E.2d 574 (1980).

OPINIONS OF THE ATTORNEY GENERAL

Coin-operated games. — Only if a coin-operated game can register more than fifteen free replays and has a "trip switch" allowing games to be erased other than by reactivating the machine for additional plays is the device a prohibited gambling device; if such a game is for bona fide amusement purposes only, it is legal. However, the transfer of anything of value in exchange for a free replay on any coin

operated device, whether or not the device constitutes a gambling device per se, is illegal. 1990 Op. Att'y Gen. No. 90-15 (decided prior to 1996 amendment).

Video slot machine which involves no skill in the machine's operation and offers a ticket for a value of up to \$5.00 in merchandise is a "gambling device". 1996 Op. Att'y Gen. No. U96-18.

RESEARCH REFERENCES

Am. Jur. 2d. — 38 Am. Jur. 2d, Gambling, § 74.

ALR. — Coin-operated or slot machine other than slot vending machine which may be played for amusement only or which confines winner's reward to privilege of additional play or other form of

amusement, as within anti-gambling provisions, 148 ALR 879; 89 ALR2d 815.

Coin-operated pinball machine or similar device, played for amusement only or confining reward to privilege of free replays, as prohibited or permitted by anti-gambling laws, 89 ALR2d 815.

16-12-36. Lawful promotional and giveaway contests.

(a) A promotional or giveaway contest which conforms with the qualifications of a lawful promotion specified in paragraph (16) of subsection (b) of Code Section 10-1-393 shall not be a lottery.

(b) Except as provided in subsection (a) of this Code section, all promotions or promotional contests involving an element of chance in the distribution of prizes, gifts, awards, or other items which otherwise meet the definition of a "lottery" in this article shall be included within the definition of the term "lottery" for purposes of this article, unless specifically exempted by some other statute or law. (Code 1933, § 26-2714, enacted by Ga. L. 1982, p. 1661, § 2; Code 1981, § 16-12-36, enacted by Ga. L. 1982, p. 1661, § 4; Ga. L. 1983, p. 3, § 13; Ga. L. 1986, p. 1313, § 4.)

Cross references. — Fair Business Practices Act of 1975, § 10-1-390 et seq.

16-12-37. Dogfighting.

(a) As used in this Code section, the term “dog” means any domestic canine.

(b) Any person who:

(1) Owns, possesses, trains, transports, or sells any dog with the intent that such dog shall be engaged in fighting with another dog;

(2) For amusement or gain, causes any dog to fight with another dog or for amusement or gain, causes any dogs to injure each other;

(3) Wagers money or anything of value on the result of such dogfighting;

(4) Knowingly permits any act in violation of paragraph (1) or (2) of this subsection on any premises under the ownership or control of such person or knowingly aids or abets any such act; or

(5) Knowingly promotes or advertises an exhibition of fighting with another dog

shall be guilty of a felony and, upon the first conviction thereof, shall be punished by imprisonment of not less than one nor more than five years, a fine of not less than \$5,000.00, or both such fine and imprisonment. On a second or subsequent conviction, such person shall be punished by imprisonment of not less than one nor more than ten years, a fine of not less than \$15,000.00, or both such fine and imprisonment. Each act or omission in violation of this subsection shall constitute a separate offense.

(c) Any person who is knowingly present only as a spectator at any place for the fighting of dogs shall, upon a first conviction thereof, be guilty of a misdemeanor of a high and aggravated nature. On a second conviction, such person shall be guilty of a felony and shall be punished by imprisonment of not less than one nor more than five years, a fine of not less than \$5,000.00, or both such fine and imprisonment. On a third or subsequent conviction, such person shall be punished by imprisonment of not less than one nor more than ten years, a fine of not less than \$15,000.00, or both such fine and imprisonment. Each act in violation of this subsection shall constitute a separate offense.

(d) Any dog subject to fighting may be impounded pursuant to the provisions of Code Sections 4-11-9.2 through 4-11-9.6.

(e) This Code section shall not prohibit, impede, or otherwise interfere with animal husbandry, training techniques, competition, events, shows, or practices not otherwise specifically prohibited by law and shall not apply to the following activities:

(1) Owning, using, breeding, training, or equipping any animal to pursue, take, hunt, or recover wildlife or any animal lawfully hunted under Title 27 or participating in hunting or fishing in accordance with the provisions of Title 27 and rules and regulations promulgated pursuant thereto as such rules and regulations existed on the date specified in Code Section 27-1-39;

(2) Owning, using, breeding, training, or equipping dogs to work livestock for agricultural purposes in accordance with the rules and regulations of the Commissioner of Agriculture as such rules and regulations existed on January 1, 2008;

(3) Owning, using, breeding, training, or equipping dogs for law enforcement purposes; or

(4) Owning, using, breeding, training, or equipping any animal to control damage from nuisance or pest species in and around structures or agricultural operations. (Code 1933, § 26-2714, enacted by Ga. L. 1982, p. 2214, § 1; Code 1981, § 16-12-36, enacted by Ga. L. 1982, p. 2214, § 2; Code 1981, § 16-12-37, as redesignated by Ga. L. 1983, p. 3, § 13; Ga. L. 2008, p. 114, § 1-1/HB 301.)

Law reviews. — For survey article on criminal law and procedure, see 34 Mercer L. Rev. 89 (1982).

JUDICIAL DECISIONS

Section constitutional. — O.C.G.A. § 16-12-37, which outlaws knowing and active participation in a dogfight, infringes on no constitutionally protected conduct and is constitutionally valid. *Moody v. State*, 253 Ga. 456, 320 S.E.2d 545 (1984).

O.C.G.A. § 16-12-37, which does not make unlawful the mere allowing of a dogfight to occur, but which prohibits one from causing or allowing a dog to fight another dog for a particular purpose (i.e., sport or gambling), the term “allow” encompassing knowledge and consent, is sufficiently definite to put those of common intelligence on notice that knowing participation in a dogfighting event is prohibited. *Hargrove v. State*, 253 Ga. 450, 321 S.E.2d 104 (1984).

While O.C.G.A. § 16-12-4 makes it a misdemeanor for anyone to subject any animal to cruel treatment, O.C.G.A. § 16-12-37 does not violate equal protection, because the legislature acted within its discretion in mandating that those who

participate in a dogfight organization for sport or gaming purposes should be dealt with more harshly. *Hargrove v. State*, 253 Ga. 450, 321 S.E.2d 104 (1984).

Van used to transport fighting dogs may be condemned under § 16-12-32.

— Van used to transport two fighting dogs to the scene of dogfights and which was thus used to facilitate a dogfight in violation of O.C.G.A. § 16-12-37, may be condemned as provided in O.C.G.A. § 16-12-32. *Macon Auto Cleaners v. State*, 175 Ga. App. 13, 332 S.E.2d 324 (1985).

Evidence sufficient for conviction.

— Evidence that defendant was four hundred miles from defendant's home shortly after dawn in a remote area of the state where dogfighting and gambling were taking place, that defendant was apprehended directly next to a pit where dogfighting was underway, and that defendant was arrested with \$899 on defendant's person was sufficient for a rational trier of fact to conclude that defendant was guilty of allowing dogfighting to take

place and gambling. *Barton v. State*, 253 Ga. 478, 322 S.E.2d 54 (1984).

Evidence insufficient for conviction. — When the state offered no evidence linking defendants to the area where dogfighting and gambling were taking place, but only showed that the defendants were “brought back” from an undetermined place by an unidentified officer and searched next to the dog pit, evidence

was insufficient to support convictions for dogfighting and gambling. *Barton v. State*, 253 Ga. 478, 322 S.E.2d 54 (1984).

Penalty provision constitutional. — A \$5,000.00 fine and an optional one year in prison does not amount to cruel and unusual punishment for those convicted of dogfighting in this state. *Hargrove v. State*, 253 Ga. 450, 321 S.E.2d 104 (1984).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required for violators. — Offenses arising under O.C.G.A. § 16-12-37(c) are designated as offenses

for which those charged are to be fingerprinted. 2009 Op. Att’y Gen. No. 2009-1.

16-12-38. Pyramid promotional schemes; prohibition; exceptions; penalties.

(a) As used in this Code section, the term:

(1) “Compensation” means a payment of any money, thing of value, or financial benefit.

(2) “Consideration” means the payment of cash or the purchase of goods, services, or intangible property, and does not include the purchase of goods or services furnished at cost to be used in making sales and not for resale, or time and effort spent in pursuit of sales or recruiting activities.

(3) “Inventory” includes both goods and services, including company produced promotional materials, sales aids, and sales kits that the plan or operation requires independent salespersons to purchase.

(4) “Inventory loading” means that the plan or operation requires or encourages its independent salespersons to purchase inventory in an amount which unreasonably exceeds that which the salesperson can expect to resell for ultimate consumption or to use or consume in a reasonable time period.

(5) “Participant” means a person who joins a plan or operation.

(6) “Person” means an individual, a corporation, a partnership, or any association or unincorporated organization.

(7) “Promote” means to contrive, prepare, establish, plan, operate, advertise, or to otherwise induce or attempt to induce another person to be a participant.

(8) “Pyramid promotional scheme” means any plan or operation in which a participant gives consideration for the right to receive

compensation that is derived primarily from the recruitment of other persons as participants into the plan or operation rather than from the sale of goods, services, or intangible property to participants or by participants to others.

(b)(1) No person may establish, promote, operate, or participate in any pyramid promotional scheme. A limitation as to the number of persons who may participate or the presence of additional conditions affecting eligibility for the opportunity to receive compensation under the plan does not change the identity of the plan as a pyramid promotional scheme. It is not a defense under this subsection that a person, on giving consideration, obtains goods, services, or intangible property in addition to the right to receive compensation.

(2) Nothing in this Code section may be construed to prohibit a plan or operation, or to define a plan or operation as a pyramid promotional scheme, based on the fact that participants in the plan or operation give consideration in return for the right to receive compensation based upon purchases of goods, services, or intangible property by participants for personal use, consumption, or resale so long as the plan or operation does not promote or induce inventory loading and complies with the cancellation requirements of subsection (d) of Code Section 10-1-415.

(3) Any person who participates in a pyramid promotional scheme shall be guilty of a misdemeanor of a high and aggravated nature. Any person who establishes, promotes, or operates a pyramid promotional scheme shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years.

(4) Nothing in this Code section shall be construed so as to include a "multilevel distribution company," as defined in paragraph (6) of Code Section 10-1-410, which is operating in compliance with Part 3 of Article 15 of Chapter 1 of Title 10. (Code 1981, § 16-12-38, enacted by Ga. L. 1985, p. 437, § 2; Ga. L. 1988, p. 1868, § 3; Ga. L. 1992, p. 6, § 16; Ga. L. 2005, p. 657, § 1/SB 141.)

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required for violators. — O.C.G.A. § 16-12-38 is an offense for which those charged with a violation are to be fingerprinted. 2006 Op. Att'y Gen. No. 2006-2.

PART 2

BINGO

Cross references. — Bingo games, Ga. Const. 1983, Art. I, Sec. II, Para. VIII.

Administrative rules and regulations. — Nonprofit BINGO games, Offi-

cial Compilation of the Rules and Regulations of the State of Georgia, Georgia Bureau of Investigation, Chapter 92-2.

JUDICIAL DECISIONS

Georgia Constitution does not preclude regulation of bingo by the legislature. — Restriction on operation of nonprofit bingo games indicates an intent to permit only small, nonprofessional bingo operations in which virtually all profits accrue to nonprofit groups and provision for public reports of financial affairs of organizations running nonprofit bingo operations indicates that the legislature wanted to obtain information about these operations for purpose of enacting legislation to prevent abuses. *St. John's Melkite Catholic Church v. Commissioner of Revenue*, 240 Ga. 733, 242 S.E.2d 108 (1978).

Legislature may reasonably regu-

late legal bingo to prevent commercialization of operations, to prevent unnecessary diversion of bingo profits from coffers of nonprofit organizations, and otherwise to promote public welfare consistent with the intent of Ga. L. 1977, p. 1164. *St. John's Melkite Catholic Church v. Commissioner of Revenue*, 240 Ga. 733, 242 S.E.2d 108 (1978).

Cited in *St. John's Melkite Catholic Church v. Commissioner of Revenue*, 240 Ga. 733, 242 S.E.2d 108 (1978); *Midway Youth Football Ladies Auxiliary, Inc. v. Strickland*, 449 F. Supp. 418 (N.D. Ga. 1978).

RESEARCH REFERENCES

Am. Jur. 2d. — 38 Am. Jur. 2d, Gambling, §§ 21, 37.

C.J.S. — 38 C.J.S., Gaming, § 10, 140 et seq.

ALR. — Constitutionality of statute which affirmatively permits certain forms of betting or gambling, 85 ALR 622.

16-12-50. Legislative intent.

It is the intention of the General Assembly that, except for recreational bingo, only nonprofit, tax-exempt organizations which are properly licensed pursuant to this part shall be allowed to operate bingo games. (Ga. L. 1977, p. 1164, § 8; Ga. L. 1978, p. 853, § 6; Ga. L. 1993, p. 535, § 1.)

Cross references. — Tax-exempt corporations and organizations, § 48-7-25.

16-12-51. Definitions.

As used in this part, the term:

(1) "Bingo game" or "nonprofit bingo game" means a game of chance played on cards with numbered squares in which counters or indicators are placed on numbers chosen by lot and won by covering

a previously specified number or order of numbered squares. A bingo game may be played manually or with an electronic or computer device that stores the numbers from a player's card or cards, tracks the numbers chosen by lot when such numbers are entered by the player, and notifies the player of a winning combination. Such words, terms, or phrases, as used in this paragraph, shall be strictly construed to include only the series of acts generally defined as bingo and shall exclude all other activity.

(2) "Bingo session" means a time period during which bingo games are played.

(3) "Director" means the director of the Georgia Bureau of Investigation.

(3.1) "Nonprofit, tax-exempt organization" means an organization, association, corporation, or other legal entity which has been determined by the federal Internal Revenue Service to be exempt from taxation under federal tax law and which is exempt from taxation under the income tax laws of this state under Code Section 48-7-25; which is organized or incorporated in this state or authorized to do business in this state; and which uses the proceeds from any bingo games conducted by such organization solely within this state.

(4) "Operate," "operated," or "operating" means the direction, supervision, management, operation, control, or guidance of activity.

(5) "Recreational bingo" means a bingo session operated by any person or entity at no charge to participants in which the prizes for each bingo game during the bingo session shall be noncash prizes and the total of such prizes for each such game shall not exceed the amount established pursuant to regulations established by the director. No such noncash prize awarded in recreational bingo shall be exchanged or redeemed for money or for any other prize with a value in excess of the amount established pursuant to regulations established by the director. Recreational bingo shall also include a bingo session operated by a nonprofit, tax-exempt licensed operator of bingo games at no charge to participants in which the participants are senior citizens attending a function at a facility of the tax-exempt licensed organization or are residents of nursing homes, retirement homes, senior centers, or hospitals and in which the prizes for each bingo game during the bingo session shall be nominal cash prizes not to exceed \$5.00 for any single prize and the total of such prizes for each such game shall not exceed the amount established pursuant to regulations established by the director. Recreational bingo shall also include a bingo session operated by an employer with ten or more full-time employees for the purposes of providing a safe workplace incentive and in which the prizes are determined by the employer;

provided, however, that no monetary consideration is required by any participant other than the employer and the employer expressly prohibits any monetary consideration from any employee. Recreational bingo shall not be considered a lottery as defined in paragraph (4) of Code Section 16-12-20 or a form of gambling as defined in Code Section 16-12-21. (Ga. L. 1977, p. 1164, § 1; Ga. L. 1978, p. 853, § 1; Ga. L. 1980, p. 422, § 1; Ga. L. 1993, p. 535, § 2; Ga. L. 1994, p. 490, § 1; Ga. L. 1994, p. 1002, § 1; Ga. L. 2003, p. 411, § 1; Ga. L. 2006, p. 339, § 1/SB 545; Ga. L. 2008, p. 898, § 2/HB 1151.)

Editor's notes. — Ga. L. 2008, p. 898, § 13, not codified by the General Assembly, provides that the amendment to this

Code section shall be applicable to all taxable years beginning on or after January 1, 2008.

16-12-52. License required to operate bingo game; recreational bingo exception.

(a) Any other law to the contrary notwithstanding except for subsection (b) of this Code section, no nonprofit, tax-exempt organization shall be permitted to operate a bingo game until the director issues a license to the organization authorizing it to do so. In the event of any controversy concerning whether or not certain activity constitutes bingo for which a license may be issued, the decision of the director shall control. The license described in this Code section is in addition to and not in lieu of any other licenses which may be required by this state or any political subdivision thereof, and no bingo game shall be operated until such time as all requisite licenses have been obtained.

(b) Recreational bingo is a nonprofit bingo game or a bingo game operated by an employer with ten or more full-time employees for the purpose of providing a safe workplace incentive and shall not be subject to the licensing requirements and regulations provided in this part applicable to bingo games not considered recreational bingo and operated by nonprofit, tax-exempt organizations. (Ga. L. 1977, p. 1164, § 2; Ga. L. 1980, p. 422, § 2; Ga. L. 1993, p. 535, § 3; Ga. L. 1994, p. 490, § 2; Ga. L. 1994, p. 1002, § 2.)

JUDICIAL DECISIONS

Georgia Constitution does not preclude imposition of license requirement. *St. John's Melkite Catholic Church v. Commissioner of Revenue*, 240 Ga. 733, 242 S.E.2d 108 (1978).

Licensing requirement does not unreasonably burden right to operate bingo games. — Since licensing requirement does not unreasonably burden right

to operate bingo games by placing unreasonable restrictions on granting of licenses, there is no conflict between Ga. L. 1977, p. 1164, § 2 and Ga. Const. 1976, Art. I, Sec. II, Para. XI (see now Ga. Const. 1983, Art. I, Sec. II, Para. VIII). *St. John's Melkite Catholic Church v. Commissioner of Revenue*, 240 Ga. 733, 242 S.E.2d 108 (1978).

16-12-53. Licensing procedure; fee; renewal.

(a) Any nonprofit, tax-exempt organization desiring to obtain a license to operate bingo games shall make application to the director on forms prescribed by the Georgia Bureau of Investigation and shall pay an annual fee of \$100.00. No license shall be issued to any nonprofit, tax-exempt organization unless the organization has been in existence for 12 months immediately prior to the issuance of the license. The license will expire at 12:00 Midnight on December 31 following the granting of the license. Renewal applications for each calendar year shall be filed with the director prior to January 1 of each year and shall be on a form prescribed by the Georgia Bureau of Investigation.

(b) Each application for a license and each application for renewal of a license shall contain the following information:

(1) The name and home address of the applicant and, if the applicant is a corporation, association, or other similar legal entity, the names and home addresses of each of the officers of the organization as well as the names and addresses of the directors, or other persons similarly situated, of the organization;

(2) The names and home addresses of each of the persons who will be operating, advertising, or promoting the bingo game;

(3) The names and home addresses of any persons, organizations, or other legal entities that will act as surety for the applicant or to which the applicant is financially indebted or to which any financial obligation is owed by the applicant;

(4) A determination letter from the Internal Revenue Service certifying that the applicant is an organization exempt under federal tax law;

(5) A statement affirming that the applicant is exempt under the income tax laws of this state under Code Section 48-7-25;

(6) The location at which the applicant will conduct the bingo games and, if the premises on which the games are to be conducted is to be leased, a copy of the lease or rental agreement;

(7) A statement showing the convictions, if any, for criminal offenses other than minor traffic offenses of each of the persons listed in paragraphs (1), (2), and (3) of this subsection; and

(8) Any other necessary and reasonable information which the director may require.

(c) The director shall refuse to grant a bingo license to any applicant who fails to provide fully the information required by this Code section.

(d) When a nonprofit, tax-exempt organization which operates or intends to operate bingo games for residents and patients of a retirement home, nursing home, or hospital operated by that organization at which gross receipts are or will be limited to \$100.00 or less during each bingo session and pays or will pay prizes having a value of \$100.00 or less during each bingo session, then, notwithstanding any other provision of this part or any rule or regulation promulgated by the director pursuant to the provisions of Code Section 16-12-61, neither the applicant nor any of the persons whose names and addresses are required under paragraphs (1) and (2) of subsection (b) of this Code section shall be required to submit or provide fingerprints or photographs as a condition of being granted a license.

(e) If the director determines that an organization has one or more auxiliaries, the members of any such auxiliary may assist in such organization's bingo operations, even if such auxiliary holds a license under this part, and the members of the main organization may assist in the bingo operations of any such licensed auxiliary. (Ga. L. 1977, p. 1164, § 3; Ga. L. 1978, p. 853, § 2; Ga. L. 1980, p. 422, §§ 3, 4; Ga. L. 1985, p. 149, § 16; Ga. L. 1990, p. 1944, § 1; Ga. L. 1991, p. 1113, § 1; Ga. L. 2001, p. 1036, § 1; Ga. L. 2004, p. 749, § 1; Ga. L. 2008, p. 898, § 3/HB 1151.)

Editor's notes. — Ga. L. 2008, p. 898, § 13, not codified by the General Assembly, provides that the amendment to this Code section shall be applicable to all taxable years beginning on or after January 1, 2008.

Law reviews. — For note on the 2001 amendment to O.C.G.A. § 16-12-53, see 18 Georgia St. U.L. Rev. 30 (2001).

JUDICIAL DECISIONS

State has legitimate interest in imposing filing fee to offset expenses, in processing required reports, and there is no explicit prohibition of this in the Constitution. Accordingly, the fee is valid, since it does not burden exercise of right

to operate bingo games so as to make their operation unreasonably difficult. *St. John's Melkite Catholic Church v. Commissioner of Revenue*, 240 Ga. 733, 242 S.E.2d 108 (1978).

16-12-54. Revocation of licenses; access to premises by law enforcement agencies.

(a) The director shall have the specific authority to suspend or revoke any license for any violation of this part or for any violation of any rule or regulation promulgated under this part. Any licensee accused of violating any provision of this part or of any rule or regulation promulgated hereunder shall be entitled, unless waived, to a hearing on the matter of the alleged violation conducted in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

(b) By making application for a license under this part, every applicant consents that the director, as well as any of his agents, together with any prosecuting attorney, as well as any of his agents, may come upon the premises of any licensee or upon any premises on which any licensee is conducting a bingo game for the purpose of examining the accounts and records of the licensee to determine if a violation of this part has occurred. (Ga. L. 1977, p. 1164, § 2; Ga. L. 1978, p. 853, § 5; Ga. L. 1980, p. 422, §§ 7, 8.)

16-12-55. (Effective until January 1, 2013. See note.) Certification of tax-exempt status of organization; issuance of certificate of licensure; evidentiary nature of certificate.

The director shall upon the request of any prosecuting attorney or his designee certify the status of any organization as to that organization's exemption from payment of state income taxes as a nonprofit organization. The director shall also upon request issue a certificate indicating whether any particular organization holds a currently valid license to operate a bingo game. Such certificates properly executed shall be admissible in evidence in any prosecution and Code Section 48-7-60, relative to the disclosure of income tax information, shall not apply to the furnishing of such certificate. (Ga. L. 1978, p. 853, § 3; Ga. L. 1980, p. 422, § 5.)

Editor's notes. — Code Section 2013, and the second version becomes 16-12-55 is set out twice in this Code. The effective on that date. first version is effective until January 1,

16-12-55. (Effective January 1, 2013. See note.) Certification of tax-exempt status of organization; issuance of certificate of licensure.

The director shall upon the request of any prosecuting attorney or his or her designee certify the status of any organization as to that organization's exemption from payment of state income taxes as a nonprofit organization. The director shall also upon request issue a certificate indicating whether any particular organization holds a currently valid license to operate a bingo game. Code Section 48-7-60, relative to the disclosure of income tax information, shall not apply to the furnishing of such certificate. (Ga. L. 1978, p. 853, § 3; Ga. L. 1980, p. 422, § 5; Ga. L. 2011, p. 99, § 26/HB 24.)

The 2011 amendment, effective January 1, 2013, inserted "or her" near the middle of the first sentence and deleted "Such certificates properly executed shall be admissible in evidence in any prosecu-

tion and" preceding "Code Section 48-7-60" at the beginning of the last sentence. See editor's note for applicability.

Editor's notes. — Code Section 16-12-55 is set out twice in this Code. The

first version is effective until January 1, 2013, and the second version becomes effective on that date.

Ga. L. 2011, p. 99, § 101, not codified by

the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

16-12-56. Issuance of annual one-day license to nonprofit, tax-exempt school; application.

Notwithstanding the other provisions of this part, the director upon receiving written application therefor shall be authorized to issue a one-time license to a nonprofit, tax-exempt school which will allow it to operate a bingo game one day annually. In such cases, the director shall have the power to waive the license fee provided for in Code Section 16-12-53, to waive the annual report provided for in Code Section 16-12-59, and otherwise promulgate rules and regulations to carry out this Code section. (Ga. L. 1977, p. 1164, § 11; Ga. L. 1980, p. 422, § 11.)

16-12-57. Restrictions as to ownership of premises utilized.

Bingo games shall be operated only on premises owned by the nonprofit, tax-exempt organization operating the bingo game, on property leased by the nonprofit, tax-exempt organization and used regularly by that organization for purposes other than the operation of a bingo game, or on property leased by the nonprofit, tax-exempt organization operating the bingo game from another nonprofit, tax-exempt organization. (Ga. L. 1977, p. 1164, § 4.)

JUDICIAL DECISIONS

Intent of Constitutional provision.

— Georgia Constitution is not intended to authorize full-time, professional bingo operations. Rather, it is intended to allow only nonprofit organizations to benefit from bingo, and to extent bingo proceeds are diverted from nonprofit groups this intent has been frustrated. *St. John's Melkite Catholic Church v. Commissioner of Revenue*, 240 Ga. 733, 242 S.E.2d 108 (1978).

Constitutionality of classification of types of premises. — Classification of types of premises based on whether owner is a nonprofit organization or not is based on a rational distinction which serves to further the purposes of Ga. L. 1977, p.

1164, § 4 (see O.C.G.A. § 16-12-57). This is not a denial of equal protection or due process, and whether or not distinctions drawn in section are imperfectly related to goals desired does not make section invalid. *St. John's Melkite Catholic Church v. Commissioner of Revenue*, 240 Ga. 733, 242 S.E.2d 108 (1978).

When nonprofit group may operate bingo game on premises rented from profit-making corporation. — Only if nonprofit group regularly uses premises for purposes other than bingo can group rent premises from profit-making corporation, or an individual. *St. John's Melkite Catholic Church v. Commissioner of Revenue*, 240 Ga. 733, 242 S.E.2d 108 (1978).

16-12-58. Age restrictions.

No person under the age of 18 years shall be permitted to play any game or games of bingo conducted pursuant to any license issued under this part unless accompanied by an adult. No person under the age of 18 years shall be permitted to conduct or assist in the conducting of any game of bingo conducted pursuant to any license issued under this part. (Ga. L. 1977, p. 1164, § 5.)

JUDICIAL DECISIONS

Provisions of Ga. L. 1977, p. 1164, § 5 (see O.C.G.A. § 16-12-58) are valid because power of state to regulate activities of minors is broader than police power to regulate conduct of adults. *St. John's Melkite Catholic Church v. Commissioner of Revenue*, 240 Ga. 733, 242 S.E.2d 108 (1978).

16-12-59. Annual report to be filed with the director.

On or before April 15 of each year, every nonprofit, tax-exempt organization engaged in operating bingo games shall file with the director a report disclosing all receipts and expenditures relating to the operation of bingo games in the previous year. The report shall be in addition to all other reports required by law. The report shall be prepared and signed by a certified public accountant competent to prepare such a report and shall be deemed a public record subject to public inspection. (Ga. L. 1977, p. 1164, § 6; Ga. L. 1980, p. 422, § 6; Ga. L. 2005, p. 1030, § 15/SB 55.)

JUDICIAL DECISIONS

Cited in *St. John's Melkite Catholic Church v. Commissioner of Revenue*, 240 Ga. 733, 242 S.E.2d 108 (1978).

16-12-60. Rules and regulations.

(a) A licensee that conducts or operates a bingo session shall maintain the following records for at least three years from the date on which the bingo session is conducted:

(1) An itemized list of the gross receipts for each session;

(2) An itemized list of all expenses other than prizes that are incurred in the conducting of the bingo session as well as the name of each person to whom the expenses are paid and a receipt for all of the expenses;

(3) A list of all prizes awarded during the bingo session and the name and address of all persons who are winners of prizes of \$50.00 or more in value;

(4) An itemized list of the recipients other than the licensee of the proceeds of the bingo game, including the name and address of each recipient to whom such funds are distributed; and

(5) A record of the number of persons who participate in any bingo session conducted by the licensee.

(b) A licensee shall:

(1) Own all the equipment used to conduct a bingo game or lease such equipment;

(2) Display its bingo license conspicuously at the location where the bingo game is conducted;

(3) Conduct bingo games only at the single location specified in the licensee's application; and

(4) Not conduct more than one bingo session during any one calendar day, which session shall not exceed five hours.

(c) No nonprofit, tax-exempt organization shall enter into any contract with any individual, firm, association, or corporation to have such individual, firm, association, or corporation operate bingo games or concessions on behalf of the nonprofit, tax-exempt organization.

(d) A nonprofit, tax-exempt organization shall not lend its name nor allow its identity to be used by any individual, firm, association, or corporation in the operating or advertising of a bingo game in which said nonprofit, tax-exempt organization is not directly and solely operating the bingo game.

(e) It shall be unlawful for two or more nonprofit, tax-exempt organizations which are properly licensed pursuant to this part to operate bingo games jointly or to operate bingo games upon the same premises during any 18 hour period.

(f) It shall be unlawful to award prizes in excess of \$1,500.00 in cash or gifts of equivalent value during any calendar day or \$3,000.00 in cash or gifts of equivalent value during any calendar week. It shall be unlawful to exceed such limits at any combination of locations operated by a single licensee or such licensee's agents or employees. It shall be unlawful for two or more licensees to pyramid the valuation of prizes in such manner as to exceed the limits contained in this Code section. The term "equivalent value" shall mean the fair market value of the gift on the date the gift is given as the prize in a bingo game.

(g) No person or organization by whatever name or composition thereof shall take any salary, expense money, or fees for the operation of any bingo game, except that not more than \$30.00 per day may be paid to one or more individuals for assisting in the conduct of such games on such day.

(h) No person shall pay consulting fees to any person for any services performed in relation to the operation or conduct of a bingo game.

(i) A person who is a member of more than one nonprofit, tax-exempt organization shall be permitted to participate in the bingo operations of only two organizations of which such person is a member; provided, however, that such person shall not receive more than \$30.00 per day for assisting in the conduct of bingo games regardless of whether such person assists both organizations in the same day. (Ga. L. 1977, p. 1164, § 8; Ga. L. 1978, p. 853, §§ 4, 6, 6A, 6B, 7; Ga. L. 1979, p. 1265, § 1; Ga. L. 1986, p. 511, §§ 1, 2; Ga. L. 2001, p. 1036, § 1; Ga. L. 2003, p. 335, § 1; Ga. L. 2003, p. 411, § 2.)

JUDICIAL DECISIONS

Intent of Constitutional provision. — Georgia Constitution is not intended to authorize full-time, professional bingo operations. Rather, the amendment is intended to allow only nonprofit organizations to benefit from bingo, and to extent bingo proceeds are diverted from nonprofit groups this intent has been frustrated. *St. John's Melkite Catholic Church v. Commissioner of Revenue*, 240 Ga. 733, 242 S.E.2d 108 (1978).

Subsection (d) does not deny any right to legitimate uses of names or identities. — Provisions prohibiting lending of organization's name to individual firm, association, or corporation which is not a nonprofit organization in a situation which will result in false or misleading promotions or advertisements, or promotions, or advertisements of unlawful bingo games, and does not deny any right to legitimate uses of names or identities. *St. John's Melkite Catholic Church v. Commissioner of Revenue*, 240 Ga. 733, 242 S.E.2d 108 (1978).

The 18-hour restriction serves to prevent establishment of full-time bingo parlors by limiting amount of use any premises receive. This is consistent with Ga. Const. 1976, Art. I, Sec. II, Para. XI (see now Ga. Const. 1983, Art. I, Sec. II, Para. VIII), the "bingo amendment," and does not deny equal protection, since it treats all organizations equally. Fact that game played by another organization prevents second group from playing for 18 hours does not treat second group differently, because the earlier group had to comply with the same restriction. *St. John's Melkite Catholic Church v. Commissioner of Revenue*, 240 Ga. 733, 242 S.E.2d 108 (1978).

Last sentence of subsection (f) merely sets forth accurate statement of meaning of "equivalent value" as used in this subsection and in Ga. Const. 1976, Art. I, Sec. II, Para. XI (see now Ga. Const. 1983, Art. I, Sec. II, Para. VIII). *St. John's Melkite Catholic Church v. Commissioner of Revenue*, 240 Ga. 733, 242 S.E.2d 108 (1978).

16-12-61. Promulgation of necessary rules and regulations by director authorized.

The director is authorized to promulgate rules and regulations which he deems necessary for the proper administration and enforcement of this part. (Ga. L. 1977, p. 1164, § 9; Ga. L. 1980, p. 422, § 9.)

16-12-62. Penalties.

Any person who operates a bingo game for which a license is required without a valid license issued by the director as provided in this part commits the offense of commercial gambling as defined in Code Section 16-12-22 and, upon conviction thereof, shall be punished accordingly. Any person who knowingly aids, abets, or otherwise assists in the operation of a bingo game for which a license is required and has not been obtained as provided in this part similarly commits the offense of commercial gambling. Any person who violates any other provision of this part, including the provisions relating to recreational bingo, shall be guilty of a misdemeanor of a high and aggravated nature. Any person who commits any such violation after having previously been convicted of any violations of this part shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years or by a fine not to exceed \$10,000.00, or both. (Ga. L. 1977, p. 1164, § 10; Ga. L. 1980, p. 422, § 10; Ga. L. 1993, p. 535, § 4.)

ARTICLE 3**OBSCENITY AND RELATED OFFENSES**

Cross references. — Power of counties and municipalities to enact ordinances which have effect of restricting adult bookstores and adult movie houses to areas zoned for commercial or industrial purposes, § 36-60-3. Use of telephone communications for obscene, threatening, or other purposes, § 46-5-21. Use of telephone to transmit obscene, lewd, or other communications for commercial purposes, § 46-5-22.

Law reviews. — For article discussing history of Georgia's written obscenity statutes from the 1860's to the late 1960's, see

19 Mercer L. Rev. 287 (1968). For article discussing obscenity laws and their conflict with U.S. Const., Amend. 1, see 8 Ga. L. Rev. 291 (1974). For article, "Misdemeanor Sentencing in Georgia," see 7 Ga. St. B.J. 8 (2001). For article, "Sex In and Out of Intimacy," see 59 Emory L.J. 809 (2010).

For comment discussing the constitutional standard for judging obscenity, in light of *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), see 10 Ga. St. B.J. 327 (1973).

JUDICIAL DECISIONS

Definition of obscenity set forth in former Code 1933, § 26-2101 et seq. was applicable to all sections dealing with same question. *Jenkins v. State*, 230 Ga. 726, 199 S.E.2d 183 (1973), rev'd on other grounds, 418 U.S. 153, 94 S. Ct. 2750, 41 L. Ed. 2d 642 (1974) (see O.C.G.A. Art. 3, Ch. 12, T. 16).

Possession of obscene material in privacy of home. — State's power to

regulate obscenity does not extend to mere possession in privacy of own home. *Warshaw v. Eastman Kodak Co.*, 148 Ga. App. 670, 252 S.E.2d 182 (1979).

Right to privately possess obscene materials does not presuppose corollary constitutional right of unregulated access. *Warshaw v. Eastman Kodak Co.*, 148 Ga. App. 670, 252 S.E.2d 182 (1979).

It would be against public policy to

return obscene material to owner.
Warshaw v. Eastman Kodak Co., 148 Ga.
App. 670, 252 S.E.2d 182 (1979).

RESEARCH REFERENCES

ALR. — Publications of a scientific, educational or instructive character regarding sex relations as within statutes relating to obscene or immoral publications, 76 ALR 1099.

Power of municipality in respect of inspection and censorship of motion-picture films, 126 ALR 1363.

Entrapment to commit offense against obscenity laws, 77 ALR2d 792.

Modern concept of obscenity, 5 ALR3d 1158.

Validity of procedures designed to protect the public against obscenity, 5 ALR3d 1214; 93 ALR3d 297.

Exhibition of obscene motion pictures as nuisance, 50 ALR3d 969.

What constitutes such discriminatory prosecution or enforcement of laws as to provide valid defense in state criminal proceedings, 95 ALR3d 280.

In personam or territorial jurisdiction of state court in connection with obscenity prosecution of author, actor, photographer, publisher, distributor, or other party whose acts were performed outside the state, 16 ALR4th 1318.

Processor's right to refuse to process or return film or video tape of obscene subject, 18 ALR4th 1326.

Validity and application of statute exempting nonmanagerial, nonfinancially interested employees from obscenity prosecution, 35 ALR4th 1237.

PART 1

GENERAL PROVISIONS

Law reviews. — For article, "Sex In and Out of Intimacy," see 59 Emory L.J. 809 (2010).

16-12-80. Distributing obscene material; obscene material defined; penalty.

(a) A person commits the offense of distributing obscene material when he sells, lends, rents, leases, gives, advertises, publishes, exhibits, or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or offers to do so, or possesses such material with the intent to do so, provided that the word "knowing," as used in this Code section, shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material; provided, however, that the character and reputation of the individual charged with an offense under this law, and, if a commercial dissemination of obscene material is involved, the character and reputation of the business establishment involved may be placed in evidence by the defendant on the question of intent to violate this law. Undeveloped photographs, molds, printing plates, and the like shall be deemed

obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(b) Material is obscene if:

(1) To the average person, applying contemporary community standards, taken as a whole, it predominantly appeals to the prurient interest, that is, a shameful or morbid interest in nudity, sex, or excretion;

(2) The material taken as a whole lacks serious literary, artistic, political, or scientific value; and

(3) The material depicts or describes, in a patently offensive way, sexual conduct specifically defined in subparagraphs (A) through (E) of this paragraph:

(A) Acts of sexual intercourse, heterosexual or homosexual, normal or perverted, actual or simulated;

(B) Acts of masturbation;

(C) Acts involving excretory functions or lewd exhibition of the genitals;

(D) Acts of bestiality or the fondling of sex organs of animals; or

(E) Sexual acts of flagellation, torture, or other violence indicating a sadomasochistic sexual relationship.

(c) Any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material under this Code section.

(d) Material not otherwise obscene may be obscene under this Code section if the distribution thereof, the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.

(e) It is an affirmative defense under this Code section that dissemination of the material was restricted to:

(1) A person associated with an institution of higher learning, either as a member of the faculty or a matriculated student, teaching or pursuing a course of study related to such material; or

(2) A person whose receipt of such material was authorized in writing by a licensed medical practitioner or psychiatrist.

(f) A person who commits the offense of distributing obscene material shall be guilty of a misdemeanor of a high and aggravated nature. (Ga. L. 1878-79, p. 163, § 1; Code 1882, § 4537a; Penal Code 1895, § 394; Penal Code 1910, § 385; Code 1933, § 26-6301; Ga. L. 1935, p.

158, § 1; Ga. L. 1941, p. 358, § 1; Ga. L. 1956, p. 801, § 1; Ga. L. 1963, p. 78, § 1; Code 1933, § 26-2101, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1971, p. 344, § 1; Ga. L. 1975, p. 498, §§ 1, 2; Ga. L. 1992, p. 6, § 16; Ga. L. 1996, p. 6, § 16.)

Cross references. — Constitutional guarantee of free speech and press, Ga. Const. 1983, Art. I, Sec. I, Para. V.

Law reviews. — For article surveying developments in Georgia constitutional law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 51 (1981). For article, "Sex In and Out of Intimacy," see 59 Emory L.J. 809 (2010).

For note, "Defending Against a Charge

of Obscenity in the Internet Age: How Google Searches Can Illuminate Miller's 'Contemporary Community Standards,'" see 26 Ga. St. U.L. Rev. 1029 (2010).

For comment on Stanley v. Georgia, 394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969) as to constitutional protection of private possession of obscene material, see 21 Mercer L. Rev. 337 (1969).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

CONSTITUTIONAL ISSUES

PRESEIZURE ADVERSARY HEARING

COMMUNITY STANDARD

COMPARATIVE EVIDENCE

INJUNCTIVE RELIEF

APPLICATION

1. IN GENERAL
2. CONSIDERATIONS IN DETERMINING OBSCENITY
3. DETERMINATION OF NUMBER OF OFFENSES COMMITTED

General Consideration

Construction. — Because O.C.G.A. § 16-12-80 prohibits a person from disseminating obscene material of any description, and the definition of obscene material makes no reference to minor, distributing obscene materials is not a crime against the person of a minor child within the plain meaning of O.C.G.A. § 24-9-23(b). Peck v. State, 300 Ga. App. 375, 685 S.E.2d 367 (2009).

States have power to determine that public exhibition of obscene materials is harmful. — States have power to make morally neutral judgment that public exhibition of obscene material, or commerce in such material, has tendency to injure community as a whole, to endanger public safety, or to jeopardize states' right to maintain a decent society. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973), cert. denied, 418 U.S. 939, 94 S. Ct. 3227, 41 L. Ed. 2d 1173 (1974).

State's broad power to regulate obscenity does not extend to mere possession by individual in privacy of the individual's own home. Gable v. Jenkins, 309 F. Supp. 998 (N.D. Ga. 1969), aff'd, 397 U.S. 592, 90 S. Ct. 1351, 25 L. Ed. 2d 595 (1970).

Former Code 1933, § 26-2101 was designed to reach only "hardcore pornography" and was outside of the protection of U.S. Const., amend. 1. Slaton v. Paris Adult Theatre I, 231 Ga. 312, 201 S.E.2d 456 (1973) (see O.C.G.A. § 16-12-80).

Section is aimed at patently offensive, "hard core" sexual conduct. — No one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct. Jenkins v. Georgia, 418 U.S. 153, 94 S. Ct. 2750, 41 L. Ed. 2d 642 (1974).

Extent of permitted regulation. — State regulation of obscenity must con-

form to procedures ensuring against curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line. *Central Agency, Inc. v. Brown*, 306 F. Supp. 502 (N.D. Ga. 1969).

O.C.G.A. § 16-12-80 is not preempted by the federal Medical Device Amendments of 1976, 21 U.S.C. § 360c et seq., as the statute does not impose any requirements relating to the safety or effectiveness of sexual devices but, rather, relates to public morality and the distribution of obscene material. *This That & The Other Gift & Tobacco, Inc. v. Cobb County*, 285 F.3d 1319 (11th Cir. 2002).

Cited in *Hawkins v. State*, 124 Ga. App. 53, 183 S.E.2d 239 (1971); *1024 Peachtree Corp. v. Slaton*, 228 Ga. 102, 184 S.E.2d 144 (1971); *Gornto v. Thomas*, 439 F.2d 1406 (5th Cir. 1971); *Sokolic v. State*, 228 Ga. 788, 187 S.E.2d 822 (1972); *Fishman v. State*, 229 Ga. 133, 189 S.E.2d 429 (1972); *Palaio v. McAuliffe*, 466 F.2d 1230 (5th Cir. 1972); *Fishman v. State*, 128 Ga. App. 505, 197 S.E.2d 467 (1973); *Sonesta Int'l Hotels Corp. v. Colony Square Co.*, 482 F.2d 281 (5th Cir. 1973); *Speight v. Slaton*, 415 U.S. 333, 94 S. Ct. 1098, 39 L. Ed. 2d 367 (1974); *Ballew v. State*, 138 Ga. App. 530, 227 S.E.2d 65 (1976); *Teal v. State*, 143 Ga. App. 47, 238 S.E.2d 128 (1977); *Ritchie v. State*, 240 Ga. 15, 240 S.E.2d 551 (1977); *Allen v. State*, 144 Ga. App. 233, 240 S.E.2d 754 (1977); *Cargal v. State*, 144 Ga. App. 238, 241 S.E.2d 8 (1977); *Ballew v. State*, 144 Ga. App. 238, 241 S.E.2d 19 (1977); *Ballew v. Georgia*, 435 U.S. 223, 98 S. Ct. 1029, 55 L. Ed. 2d 234 (1978); *Simpson v. State*, 144 Ga. App. 657, 242 S.E.2d 265 (1978); *Hays v. State*, 145 Ga. App. 65, 243 S.E.2d 263 (1978); *Hess v. State*, 145 Ga. App. 685, 244 S.E.2d 587 (1978); *Pierce v. State*, 145 Ga. App. 680, 244 S.E.2d 589 (1978); *Spillers v. State*, 145 Ga. App. 809, 245 S.E.2d 54 (1978); *Farmer v. State*, 146 Ga. App. 118, 245 S.E.2d 467 (1978); *Chancey v. State*, 146 Ga. App. 20, 245 S.E.2d 470 (1978); *Johnson v. State*, 147 Ga. App. 112, 248 S.E.2d 565 (1978); *Speight v. State*, 148 Ga. App. 87, 251 S.E.2d 36 (1978); *Kametches v. State*, 242 Ga. 721, 251 S.E.2d 232 (1978); *Stop, Inc. v. State*, 149 Ga. App. 306, 254 S.E.2d 463 (1979);

M.G.T. Corp. v. State, 149 Ga. App. 588, 254 S.E.2d 909 (1979); *Terry v. State*, 152 Ga. App. 344, 262 S.E.2d 496 (1979); *Whisenhunt v. State*, 152 Ga. App. 829, 264 S.E.2d 271 (1979); *Denton v. State*, 154 Ga. App. 427, 268 S.E.2d 725 (1980); *Spry v. State*, 156 Ga. App. 74, 274 S.E.2d 2 (1980); *Loveland v. State*, 156 Ga. App. 746, 275 S.E.2d 387 (1980); *Septum, Inc. v. Keller*, 614 F.2d 456 (5th Cir. 1980); *Wood v. Georgia*, 450 U.S. 261, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981); *Gateway Books, Inc. v. State*, 157 Ga. App. 843, 278 S.E.2d 728 (1981); *American Booksellers Ass'n v. McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981); *Westmoreland v. State*, 164 Ga. App. 455, 297 S.E.2d 357 (1982); *Penthouse Int'l, Ltd. v. McAuliffe*, 702 F.2d 925 (11th Cir. 1983); *Smith v. State*, 174 Ga. App. 238, 329 S.E.2d 507 (1985); *Cunningham v. State*, 260 Ga. 827, 400 S.E.2d 916 (1991); *Chamblee Visuals v. City of Chamblee*, 270 Ga. 33, 506 S.E.2d 113 (1998); *2025 Highway, L.L.C. v. Bibb County*, 377 F. Supp. 2d 1310 (M.D. Ga. 2005).

Constitutional Issues

Private possession of obscene materials is protected under U.S. Const., amends. 1 and 14. *Gable v. Jenkins*, 309 F. Supp. 998 (N.D. Ga. 1969), aff'd, 397 U.S. 592, 90 S. Ct. 1351, 25 L. Ed. 2d 595 (1970).

Motel owner's interest in providing obscene films to guests at the owner's motel in the privacy of the guest's own rooms was not protected by the First Amendment, notwithstanding the possibility that the people receiving the objects of the owner's commerce might be shielded from state regulation in the guest's use of the obscene materials. *Majmundar v. Veline*, 256 Ga. 8, 342 S.E.2d 682 (1986).

Constitutional right to possess obscene material does not imply rights to purchase or distribute it. — Former Code 1933, § 26-2101 was not violative of U.S. Const., amends. 1, 4, 5, 9 and 14 on the ground that the constitutional right to mere possession of obscene material necessarily implies the right to purchase such material and, hence, the right of others to distribute the material. *Walter v. State*,

Constitutional Issues (Cont'd)

131 Ga. App. 667, 206 S.E.2d 662, appeal dismissed, 233 Ga. 10, 209 S.E.2d 605 (1974); *Playmate Cinema, Inc. v. State*, 154 Ga. App. 871, 269 S.E.2d 883 (1980) (see O.C.G.A. § 16-12-80).

Commerce in obscene material is unprotected by any constitutional doctrine of privacy. — States have a legitimate interest in regulating commerce in obscene material and in regulating exhibition of obscene material in places of public accommodation, including so-called “adult” theaters from which minors are excluded. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973), cert. denied, 418 U.S. 939, 94 S. Ct. 3227, 41 L. Ed. 2d 1173 (1974).

Obscenity is not within the protected pale of U.S. Const., amends. 1, 14. *Gable v. Jenkins*, 309 F. Supp. 998 (N.D. Ga. 1969), aff’d, 397 U.S. 592, 90 S. Ct. 1351, 25 L. Ed. 2d 595 (1970).

Implicit in history of U.S. Const., amend. 1 is rejection of obscenity as utterly without redeeming social importance. *Evans Theatre Corp. v. Slaton*, 227 Ga. 377, 180 S.E.2d 712, cert. denied, 404 U.S. 950, 92 S. Ct. 281, 30 L. Ed. 2d 267 (1971).

Obscenity is not protected by free speech clause of U.S. Const., amend. 1, and may be regulated by the state. *Slaton v. Paris Adult Theatre I*, 231 Ga. 312, 201 S.E.2d 456 (1973); *S.S.W. Corp. v. Slaton*, 231 Ga. 734, 204 S.E.2d 155 (1974).

Films portraying hard core sexual conduct, for its own sake, not protected speech. — When defendant’s films amounted to nothing more than a public portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain, the films were not protected by U.S. Const., amend. 1 and were obscene within the definition of former Code 1933, § 26-2101(b). *Clayton v. State*, 149 Ga. App. 374, 254 S.E.2d 495 (1979) (see O.C.G.A. § 16-12-80(b)).

Devices which are within the definition of O.C.G.A. § 16-12-80(c) are not protected expressions under either the First Amendment of the U.S. Constitution or the free speech clause of the Georgia

Constitution. *Morrison v. State*, 272 Ga. 129, 526 S.E.2d 336 (2000).

Constitutionality of section. — See *Dyke v. State*, 232 Ga. 817, 209 S.E.2d 166 (1974), cert. denied, 421 U.S. 952, 95 S. Ct. 1687, 44 L. Ed. 2d 106 (1975); *Pierce v. State*, 239 Ga. 844, 239 S.E.2d 28 (1977).

Constitutionality of O.C.G.A. § 16-12-80(a) and (c) has been upheld. *Williams v. State*, 157 Ga. App. 494, 277 S.E.2d 781 (1981).

Constitutionality of former Code 1933, § 26-2101 has been finally and conclusively determined. *Dobbs v. State*, 145 Ga. App. 14, 243 S.E.2d 275, cert. denied, 439 U.S. 899, 99 S. Ct. 265, 58 L. Ed. 2d 248 (1978) (see O.C.G.A. § 16-12-80).

Former Code 1933, § 26-2101 was constitutional. *S.S.W. Corp. v. Slaton*, 231 Ga. 734, 204 S.E.2d 155 (1974); *Wood v. State*, 144 Ga. App. 236, 240 S.E.2d 743 (1977), cert. denied, 439 U.S. 899, 99 S. Ct. 265, 58 L. Ed. 2d 247 (1978); *Showcase Cinemas, Inc. v. State*, 156 Ga. App. 225, 274 S.E.2d 578 (1980) (see O.C.G.A. § 16-12-80).

Former Code 1933, § 26-2101 was not unconstitutionally vague. *Walter v. State*, 131 Ga. App. 677, 206 S.E.2d 662, appeal dismissed, 233 Ga. 10, 209 S.E.2d 605 (1974); *This That & The Other Gift & Tobacco, Inc. v. Cobb County*, 285 F.3d 1319 (11th Cir. 2002) (see O.C.G.A. § 16-12-80).

Former Code 1933, § 26-2101 was not overly broad or vague in definition. *Slaton v. Paris Adult Theatre I*, 231 Ga. 312, 201 S.E.2d 456 (1973) (see O.C.G.A. § 16-12-80).

Former Code 1933, § 26-2101 was not violative of U.S. Const., amend. 1. *Brown v. State*, 156 Ga. App. 201, 274 S.E.2d 572 (1980) (see O.C.G.A. § 16-12-80).

Advertising ban violates First Amendment. — Advertising ban on sexual devices found in O.C.G.A. § 16-12-80 violates the First Amendment as: (1) an advertisement targeting lawful consumers would not necessarily be misleading simply because certain persons encountering the advertisement could not lawfully purchase such devices, and an explanation of those persons entitled to purchase such devices would not need to

be lengthy and complex; and (2) the ban is more extensive than necessary. *This That & The Other Gift & Tobacco, Inc. v. Cobb County*, 285 F.3d 1319 (11th Cir. 2002).

When a prior appellate panel decided that O.C.G.A. § 16-12-80 banned all advertising of the sexual devices in issue in violation of the First Amendment, the district court on remand violated the law-of-the-case doctrine when the court revisited the issue of whether the statute violated the plaintiffs' First Amendment rights and granted the defendants summary judgment. *This That & the Other Gift & Tobacco, Inc. v. Cobb County*, 439 F.3d 1275 (11th Cir. 2006).

Former Code 1933, § 26-2101 did not violate U.S. Const., amends. 1 and 14. *Gable v. Jenkins*, 309 F. Supp. 998 (N.D. Ga. 1969), aff'd, 397 U.S. 592, 90 S. Ct. 1351, 25 L. Ed. 2d 595 (1970); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973), cert. denied, 418 U.S. 939, 94 S. Ct. 3227, 41 L. Ed. 2d 1173 (1974); *Flynt v. State*, 153 Ga. App. 232, 264 S.E.2d 669 (1980) (see O.C.G.A. § 16-12-80).

Expression outside defined area is constitutionally protected expression. — Any statute or ordinance which seeks to impose criminal or civil sanctions for exercise of expression that is not obscene cannot withstand proper constitutional attack for overbreadth. *Sanders v. State*, 231 Ga. 608, 203 S.E.2d 153 (1974).

Former Code 1933, § 26-2101 was not unconstitutional as overbroad, arbitrary, or capricious that the statute constituted an unreasonable invasion of an adult's or married couple's right of sexual privacy, or that no necessity or rational basis appeared for the total prohibition of these types of devices. *Hostetler v. State*, 145 Ga. App. 55, 243 S.E.2d 256, cert. denied, 439 U.S. 947, 99 S. Ct. 341, 58 L. Ed. 2d 339 (1978); *Whisenhunt v. State*, 156 Ga. App. 583, 275 S.E.2d 82 (1980) (see O.C.G.A. § 16-12-80).

Former Code 1933, § 26-2101(c) was not unconstitutional for vagueness and overbreadth. *Sewell v. State*, 238 Ga. 495, 233 S.E.2d 187 (1977), appeal dismissed, 435 U.S. 982, 98 S. Ct. 1635, 56 L. Ed. 2d 76 (1978) (see O.C.G.A. § 16-12-80(c)).

Former Code 1933, § 26-2101 did not violate constitutional requirement of scienter. *Northcutt v. State*, 157 Ga. App. 762, 278 S.E.2d 702 (1981) (see O.C.G.A. § 16-12-80).

When charge on constructive knowledge was in exact language of O.C.G.A. § 16-12-80 and did not place greater burden on appellant than knowledge of contents of materials appellant distributed in prosecution for distribution of obscene materials, the charge did not violate constitutional scienter requirement. *Mason v. State*, 159 Ga. App. 755, 285 S.E.2d 91 (1981).

Constructive knowledge, as defined in former Code 1933, § 26-2101(a), did not violate constitutional standards. *Wood v. State*, 144 Ga. App. 236, 240 S.E.2d 743 (1977), cert. denied, 439 U.S. 899, 99 S. Ct. 265, 58 L. Ed. 2d 247 (1978) (see O.C.G.A. § 16-12-80(a)).

Charge on constructive knowledge does not violate constitutional requirements of scienter. *Paperback Book Mart, Inc. v. State*, 148 Ga. App. 377, 251 S.E.2d 396 (1978).

Constitutional attack upon former Code 1933, § 26-2101 that constructive knowledge as found therein was a violation of constitutional requirements as to scienter was not meritorious. *Showcase Cinemas, Inc. v. State*, 156 Ga. App. 225, 274 S.E.2d 578 (1980) (see O.C.G.A. § 16-12-80).

Preseizure Adversary Hearing

Absence of constitutionally sufficient warrant. — Arrest and seizure of obscene materials without constitutionally sufficient warrant is unreasonable and evidence is not admissible. *Wood v. State*, 144 Ga. App. 236, 240 S.E.2d 743 (1977), cert. denied, 439 U.S. 899, 99 S. Ct. 265, 58 L. Ed. 2d 247 (1978).

Requiring adversary hearing before seizure of materials relates merely to competency of evidence in obscenity prosecution and does not bar prosecution based on other legally obtained evidence. Matter seized illegally, i.e., without a hearing, must be returned. *Gable v. Jenkins*, 309 F. Supp. 998 (N.D. Ga. 1969), aff'd, 397 U.S. 592, 90 S. Ct. 1351, 25 L. Ed. 2d 595 (1970).

Preseizure Adversary Hearing (Cont'd)

Prosecution or threat thereof before adversary determination of obscenity constitutes unconstitutional burden upon freedom of expression. *Sokolic v. Ryan*, 304 F. Supp. 213 (S.D. Ga. 1969).

Any criminal prosecution prior to adversary hearing is violative of U.S. Const., amend. 1. *Sokolic v. Ryan*, 304 F. Supp. 213 (S.D. Ga. 1969).

Unconstitutional system of prior restraint with respect to certain men's magazines was engaged in by local law enforcement authorities where such authorities did not obtain warrant from neutral and detached magistrate based upon threshold determination of obscenity before making series of arrests of dealers and distributors on charges that their dealings in such magazines violated obscenity laws. *Penthouse Int'l, Ltd. v. McAuliffe*, 436 F. Supp. 1241 (N.D. Ga. 1977), aff'd in part and rev'd in part on other grounds, 610 F.2d 1353 (5th Cir.), cert. dismissed, 447 U.S. 931, 100 S. Ct. 3031, 65 L. Ed. 2d 1131 (1980).

Unlawful warrantless arrest without seizure of materials does not constitute prior restraint. — There is no prior restraint of freedom of expression by any unlawful state-initiated or state-enforced restraint where a warrantless arrest is made but no obscene materials are seized. *Wood v. State*, 144 Ga. App. 236, 240 S.E.2d 743 (1977), cert. denied, 439 U.S. 899, 99 S. Ct. 265, 58 L. Ed. 2d 247 (1978).

Adversary judicial hearing on question of obscenity is prerequisite to seizure of materials. — It is illegal for officers to seize a movie film unless and until there has been held a prior adversary judicial hearing upon question of obscenity. The Supreme Court has decided that lest the nonobscene and constitutionally protected be suppressed it is better that some judicial officer determine that challenged matter is obscene before its seizure. *Gable v. Jenkins*, 309 F. Supp. 998 (N.D. Ga. 1969), aff'd, 397 U.S. 592, 90 S. Ct. 1351, 25 L. Ed. 2d 595 (1970).

One procedural protection afforded publications regardless of eventual evaluation

or characterization of same is requirement that materials may not be seized prior to judicially conducted adversary proceeding in which same is found in fact to be obscene. *Sokolic v. Ryan*, 304 F. Supp. 213 (S.D. Ga. 1969).

Before a seizure of alleged obscene material can be made, an adversary hearing on question of its obscenity must first be had. *Central Agency, Inc. v. Brown*, 306 F. Supp. 502 (N.D. Ga. 1969); *Peachtree News Co. v. Slaton*, 226 Ga. 471, 175 S.E.2d 539 (1970).

Determination of obscenity is prerequisite to revocation of business license. — Just as there can be no massive seizure of allegedly obscene materials for destruction without a prior adversary type hearing and determination of obscenity, there can be no valid revocation of a business license for having exhibited an obscene film without such prior hearing and determination. *106 Forsyth Corp. v. Bishop*, 362 F. Supp. 1389 (M.D. Ga. 1972), aff'd, 482 F.2d 280 (5th Cir. 1973), cert. denied, 422 U.S. 1044, 95 S. Ct. 2660, 45 L. Ed. 2d 696 (1975).

Adversary hearing not required prior to instituting of criminal action as to purchased materials. *Gornto v. McDougall*, 336 F. Supp. 1372 (S.D. Ga. 1972), appeal dismissed, 482 F.2d 361 (5th Cir. 1973).

Distinction between seizure of materials and purchase by prosecuting attorney. — There is a vast distinction in requiring an adversary hearing for a determination of obscenity before seizure of books, and requiring such hearing when books were not seized but were procured by purchase from dealer by prosecuting attorney and are in the prosecutor's possession. *Peachtree News Co. v. Slaton*, 226 Ga. 471, 175 S.E.2d 539 (1970).

Community Standard

Material must substantially exceed limits of candor set by contemporary community standards. — U.S. Const., amend. 14 does not permit conviction on obscenity charges unless work complained of is found substantially to exceed limits of candor set by contemporary community standards. *Flynt v. State*, 153 Ga. App. 232, 264 S.E.2d 669, cert. denied, 449 U.S.

888, 101 S. Ct. 245, 66 L. Ed. 2d 114 (1980).

Court cannot rebuff all efforts to enlighten the jury as to community standards. — While a state is not precluded from regarding trier of fact as the embodiment of community standards competent to judge a challenged work against those standards, it is not privileged to rebuff all efforts to enlighten or persuade the trier. *Flynt v. State*, 153 Ga. App. 232, 264 S.E.2d 669, cert. denied, 449 U.S. 888, 101 S. Ct. 245, 66 L. Ed. 2d 114 (1980).

Determination of community standards is not based merely upon what is appropriate for children. *Dumas v. State*, 131 Ga. App. 79, 205 S.E.2d 119 (1974).

Jurors judging contemporary community standards according to their own communities. — It is constitutionally permissible to permit juries to rely on understanding of community from which they came as to contemporary community standards, and states have considerable latitude in framing statutes under this element. A state may choose to define an obscenity offense in terms of contemporary community standards without further specification, or it may choose to define standards in more precise geographic terms. *Jenkins v. Georgia*, 418 U.S. 153, 94 S. Ct. 2750, 41 L. Ed. 2d 642 (1974).

Jurors to consider evidence in light of standards of community. — Jurors represent average members of their own community and, as triers of fact are charged with responsibility of making determination of whether material is obscene, guided by evidence presented by their individual and collective awareness of standards and norms of their community. *Gornto v. State*, 227 Ga. 46, 178 S.E.2d 894 (1970).

Local community standard applied. — Standard to be applied is not what may or may not have been held to be obscene in other jurisdictions, but what is acceptable in local community. *Gornto v. State*, 227 Ga. 46, 178 S.E.2d 894 (1970).

Juries can consider state or local community standards in lieu of national standards. *Jenkins v. State*, 230 Ga. 726, 199 S.E.2d 183 (1973), rev'd on

other grounds, 418 U.S. 153, 94 S. Ct. 2750, 41 L. Ed. 2d 642 (1974).

Community by which standards for obscenity are gauged is the State of Georgia rather than nation-wide community or any smaller unit of the state. *Dumas v. State*, 131 Ga. App. 79, 205 S.E.2d 119 (1974).

Specification of what "community" not required in instruction. — Trial court's charge to jury to apply "community standards" in determining whether material was obscene, without specifying what "community" was proper. *Lee v. State*, 214 Ga. App. 164, 447 S.E.2d 323 (1994).

Use of word "approved" in course of defining phrase "community standards" is proper. 2150 Stewart Ave., Inc. v. State, 173 Ga. App. 407, 326 S.E.2d 579 (1985).

Definition of community standard for jury. — Instructing jury that "community standards" is defined in terms of what an average person in the community would approve of, as opposed to tolerate, does not constitute harmful or reversible error in prosecution for distributing obscene materials. 134 Baker St., Inc. v. State, 172 Ga. App. 738, 324 S.E.2d 575 (1984).

Use of accept in jury instructions. — In instructions on community standard, use of word "acceptance" rather than "tolerance" is not harmful error. *Brown v. State*, 156 Ga. App. 201, 274 S.E.2d 572 (1980); *Williams v. State*, 157 Ga. App. 494, 277 S.E.2d 781 (1981).

Comparative Evidence

Rationale behind admission of comparative evidence in an obscenity case is to allow defendant the opportunity to attempt to persuade trier of fact that challenged material does not exceed contemporary community standards, as represented by comparable material and against which challenged material is judged. *Flynt v. State*, 153 Ga. App. 232, 264 S.E.2d 669, cert. denied, 449 U.S. 888, 101 S. Ct. 245, 66 L. Ed. 2d 114 (1980).

Evidence of mere availability of similar materials is insufficient. — Evidence of mere availability of similar materials is not by itself sufficiently probative of community standards to be

Comparative Evidence (Cont'd)

admissible in absence of proof that material enjoys a reasonable degree of community acceptance. *Flynt v. State*, 153 Ga. App. 232, 264 S.E.2d 669, cert. denied, 449 U.S. 888, 101 S. Ct. 245, 66 L. Ed. 2d 114 (1980).

Defendant must show reasonable degree of community acceptance. — Predicate for conclusion that disputed piece of material is acceptable under contemporary community standards, as shown by proffered other matter already in unquestioned circulation, must be that the two types of matter are similar, and as another part of defendant's foundation defendant must show a reasonable degree of community acceptance of works like defendant's own. *Flynt v. State*, 153 Ga. App. 232, 264 S.E.2d 669, cert. denied, 449 U.S. 888, 101 S. Ct. 245, 66 L. Ed. 2d 114 (1980).

Sales figures may be used to satisfy community acceptance foundational requirement. *Flynt v. State*, 153 Ga. App. 232, 264 S.E.2d 669, cert. denied, 449 U.S. 888, 101 S. Ct. 245, 66 L. Ed. 2d 114 (1980).

Comparative evidence must be proffered as a whole to satisfy defendant's burden of demonstrating that comparable evidence is similar to defendant's challenged material. *Flynt v. State*, 153 Ga. App. 232, 264 S.E.2d 669, cert. denied, 449 U.S. 888, 101 S. Ct. 245, 66 L. Ed. 2d 114 (1980).

Injunctive Relief

Threat to property interest permits injunction against investigation and prosecution. — Motel owner's showing that the owner depended upon income from movie rentals in making the decision to purchase the motel and in sustaining the business established a sufficient threat to a property interest to permit an injunction of an investigation and any prosecution under the state obscenity statute. *Majmundar v. Veline*, 256 Ga. 8, 342 S.E.2d 682 (1986).

Exhibition of film falling within definition of former Code 1933, § 26-2101 can be enjoined. *S.S.W. Corp. v. Slaton*, 231 Ga. 734, 204 S.E.2d 155

(1974) (see O.C.G.A. § 16-12-80).

Exhibition of obscene materials may be enjoined in civil proceeding. — Former Code 1933, § 26-2101 defined a criminal offense, but the exhibition of materials found to be obscene as defined by that section may be enjoined in a civil proceeding under Georgia case law. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973), cert. denied, 418 U.S. 939, 94 S. Ct. 3227, 41 L. Ed. 2d 1173 (1974) (see O.C.G.A. § 16-12-80).

Temporary injunction hearings to restrain film showings need not follow procedures of final hearings determining rights. — Mere temporary injunction hearings to determine whether a temporary injunction should be issued restraining showing of a film need not be surrounded with formalities of procedure that must attend hearings finally determining rights. *Walter v. Slaton*, 227 Ga. 676, 182 S.E.2d 464, cert. denied, 404 U.S. 1003, 92 S. Ct. 560, 30 L. Ed. 2d 557 (1971).

Interlocutory judicial determination of obscenity not equivalent of probable cause that material may be obscene. *S.S.W. Corp. v. Slaton*, 231 Ga. 734, 204 S.E.2d 155 (1974).

Prompt determination of free speech issues. — Interlocutory judicial restraint with respect to a claim under U.S. Const., amend. 1 should be followed as promptly as is practicable by final judicial determination of such constitutional issues. *S.S.W. Corp. v. Slaton*, 231 Ga. 734, 204 S.E.2d 155 (1974).

Temporary injunctions should be limited. — When, after viewing film, superior court judge finds probable cause that film is obscene and enjoins defendant from exhibiting or showing film in public within jurisdiction of court, injunction feature of order should be limited so as to provide that it shall continue only "until further order of court." *Walter v. Slaton*, 227 Ga. 676, 182 S.E.2d 464, cert. denied, 404 U.S. 1003, 92 S. Ct. 560, 30 L. Ed. 2d 557 (1971).

Granting continuance on temporary injunction hearings is within judge's discretion. — Whether to grant continuance on hearing to determine

whether temporary injunction should be issued restraining the showing of a film is within trial judge's sound legal discretion, and in absence of clear showing that the judge abused judicial discretion in this regard it will not be controlled. *Walter v. Slaton*, 227 Ga. 676, 182 S.E.2d 464, cert. denied, 404 U.S. 1003, 92 S. Ct. 560, 30 L. Ed. 2d 557 (1971).

Injunction impermissible to suppress distribution of literature on basis of previous publications. — Injunction is impermissible and unconstitutional when the injunction operates not to redress alleged private wrongs but to suppress, on basis of previous publications, distributions of literature of any kind. *Sanders v. State*, 231 Ga. 608, 203 S.E.2d 153 (1974).

Application

1. In General

Particular issue of a self-styled "magazine for men" fell within O.C.G.A. § 16-12-80 in that: (1) it contained a large number of photographs of women in various degrees of nudity, depicting sexual conduct and lewd exhibition in a patently offensive way; (2) the magazine's overwhelming effect, obviously planned, was to create sexual excitement and stimulation, predominantly appealing, as a whole, to the prurient interest, even though there were items that concerned topics other than sex; and (3) the magazine, taken as a whole, had no serious literary, artistic, political, or scientific value, although there may have been some slight literary, artistic, and political value to a small number of items. *Penthouse Int'l, Ltd. v. Webb*, 594 F. Supp. 1186 (N.D. Ga. 1984).

Evidence was sufficient to justify conviction of possession of obscene material with intent to disseminate where defendant offered to "take over" an adult bookstore after clerk was arrested for selling obscene magazine, and the defendant was employed by the store in a supervisory capacity. *Kervin v. State*, 172 Ga. App. 478, 323 S.E.2d 643 (1984).

Exhibition of obscene film to consenting adults is a crime. *Evans Theatre Corp. v. Slaton*, 227 Ga. 337, 180

S.E.2d 712, cert. denied, 404 U.S. 950, 92 S. Ct. 281, 30 L. Ed. 2d 267 (1971).

Obscene, pornographic films not constitutionally immune from state regulation because exhibited for consenting adults only. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973), cert. denied, 418 U.S. 939, 94 S. Ct. 3227, 41 L. Ed. 2d 1173 (1974).

Juries do not have unbridled discretion in determining what is patently offensive. *Jenkins v. Georgia*, 418 U.S. 153, 94 S. Ct. 2750, 41 L. Ed. 2d 642 (1974).

An otherwise obscene film cannot be constitutionally salvaged by adding to it a vague moral which is superimposed on predominant theme of film which is an appeal to a prurient interest in sex. *Dyke v. State*, 232 Ga. 817, 209 S.E.2d 166 (1974), cert. denied, 421 U.S. 952, 95 S. Ct. 1687, 44 L. Ed. 2d 106 (1975).

Distinction between act involving exhibition of genitals that is lewd and one that is not. — See *Penthouse Int'l, Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980), cert. dismissed, 447 U.S. 931, 100 S. Ct. 3031, 65 L. Ed. 2d 1131 (1980).

Devices prohibited under subsection (c) subject to seizure without warrant. — When sexually oriented materials offered for sale and seized were obviously for primary purpose of stimulation of human genital organs in violation of subsection (c) and the materials were in plain view to officers in a lawful position to view and see the materials, no warrant was necessary to make a lawful seizure. *Ball v. State*, 149 Ga. App. 270, 253 S.E.2d 886 (1979).

Officer cannot make initial determination concerning obscenity of publication. — Ability to conduct warrantless arrest for offense committed in officer's presence contemplates officer's ability to determine that an offense has actually been committed; officer was incorrect in the officer's belief that the officer or the officer's agents may properly make initial determination concerning obscenity of a publication and that the officer may make a warrantless arrest if the officer determines that the subject matter of a publication is obscene. *Penthouse*

Application (Cont'd)**1. In General (Cont'd)**

Int'l, Ltd. v. McAuliffe, 610 F.2d 1353 (5th Cir. 1980), cert. dismissed, 447 U.S. 931, 100 S. Ct. 3031, 65 L. Ed. 2d 1131 (1980).

Additional charge regarding "tendency to excite lustful thoughts." — In view of trial court's charge instructing jury that in order for the jury to find materials in question obscene the jury must first determine that magazines met criteria set forth in subsection (b), the court's additional instruction that material "which appeals to prurient interest is material which has a tendency to excite lustful thoughts," even if error, would not be harmful. *Bohin v. State*, 156 Ga. App. 206, 274 S.E.2d 592 (1980).

When crime of distributing obscene materials is completed. — Crime of distributing obscene materials is completed when a person intentionally distributes any material classified as obscene, knowing the obscene nature of that material. *Trotti v. State*, 144 Ga. App. 648, 242 S.E.2d 270, cert. denied, 439 U.S. 1051, 99 S. Ct. 733, 58 L. Ed. 2d 712 (1978).

Defendant's knowledge is question for jury. — Whether or not the defendant has "knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material" is a question generally for the jury. *Day v. State*, 190 Ga. App. 580, 379 S.E.2d 548 (1989).

Extent of knowledge necessary under former Code 1933, § 26-2101 was knowledge of facts which would put a reasonable and prudent man on notice as to suspect nature of material. *Hess v. State*, 146 Ga. App. 874, 247 S.E.2d 546 (1978) (see O.C.G.A. § 16-12-80).

Applicable test is not whether accused actually knew devices were obscene, but whether the accused has knowledge of facts which would put a reasonable and prudent man on notice as to suspect nature of the material. *Underwood v. State*, 144 Ga. App. 684, 242 S.E.2d 339 (1978); *Dorsey v. State*, 188 Ga. App. 695, 374 S.E.2d 102, cert. denied, 188 Ga. App. 911, 374 S.E.2d 102 (1988).

Charge on constructive knowledge not burden shifting where magazine

cover makes contents obvious. — In trial of case involving distribution of obscene material, charge by court on constructive knowledge is not subject to complaint that the charge shifts burden of proof and relieves the state of proving every essential element of a crime in violation of U.S. Const., amends. 1, 14, since the front cover of the magazine would put anyone on notice as to the magazine's contents. *Spry v. State*, 156 Ga. App. 74, 274 S.E.2d 2 (1980).

Evidence to warranting "Ginzburg pandering instruction." — Government need not offer extensive evidence of methods of production, editorial goals, if any, or methods of operation in order for evidence to be sufficient to trigger the "Ginzburg pandering instruction." *Whisenhunt v. State*, 156 Ga. App. 583, 275 S.E.2d 82 (1980).

Federal court will not interfere with pending state case by requiring release of contraband. — When allegedly obscene films and projectors are seized as evidence of a violation of former Code 1933, § 26-2101, and case was pending in state courts, federal courts will not interfere with pending case by requiring release of contraband as an unconstitutional seizure. *G & E Bus. Servs., Inc. v. McAuliffe*, 480 F. Supp. 239 (N.D. Ga. 1979) (see O.C.G.A. § 16-12-80).

Expert testimony where materials themselves are available for inspection. — It is no longer necessary in cases where alleged obscene materials themselves are available for inspection by finder of fact that expert testimony be produced on behalf of prosecution. *Dumas v. State*, 131 Ga. App. 79, 205 S.E.2d 119 (1974).

2. Considerations in Determining Obscenity

Test for obscenity is whether or not to average person, applying contemporary community standards, dominant theme of material taken as a whole appeals to prurient interest. *Feldschneider v. State*, 127 Ga. App. 745, 195 S.E.2d 184 (1972).

Three tests must be satisfied before written materials can be held to be obscene; these are: (1) that dominant theme of material taken as a whole appeals to

prurient interest in sex; (2) that material is patently offensive because it affronts contemporary community standards relating to description or representations of sexual matters; and (3) that the material is utterly without redeeming social value. *Feldschneider v. State*, 127 Ga. App. 745, 195 S.E.2d 184 (1972); *Gornito v. McDougall*, 336 F. Supp. 1372 (S.D. Ga. 1972), appeal dismissed, 482 F.2d 361 (5th Cir. 1973).

Obscene material is material which deals with sex in a manner appealing to prurient interest. *Whisenhunt v. State*, 156 Ga. App. 583, 275 S.E.2d 82 (1980).

"Abnormal" interest in sex is more inclusive than "prurient" interest in sex. — In prosecution for distributing obscene materials, trial court's instruction equating prurient interest with abnormal interest in sex did not present appropriate standard for review of allegedly obscene materials, in that abnormal interest is more inclusive than prurient interest. *Northcutt v. State*, 157 Ga. App. 762, 278 S.E.2d 702 (1981).

Material which appeals to prurient interest is material having a tendency to excite lustful thoughts. *Whisenhunt v. State*, 156 Ga. App. 583, 275 S.E.2d 82 (1980). But see *Bohin v. State*, 156 Ga. App. 206, 274 S.E.2d 592 (1980).

Publications to be viewed as a whole. — County district attorneys must consider magazines and other printed material as a whole. *Penthouse Int'l, Ltd. v. McAuliffe*, 454 F. Supp. 289 (N.D. Ga. 1978).

In determining obscenity or nonobscenity of magazines, they must be taken as a whole. *Flynt v. State*, 153 Ga. App. 232, 264 S.E.2d 669, cert. denied, 449 U.S. 888, 101 S. Ct. 245, 66 L. Ed. 2d 114 (1980).

Nudity alone is not enough to make material legally obscene. *Jenkins v. Georgia*, 418 U.S. 153, 94 S. Ct. 2750, 41 L. Ed. 2d 642 (1974).

Depiction of nudity and sex is not per se obscene. *Flynt v. State*, 153 Ga. App. 232, 264 S.E.2d 669, cert. denied, 449 U.S. 888, 101 S. Ct. 245, 66 L. Ed. 2d 114 (1980).

When magazine depicted group sexual activity, "prurient interest"

standard applied without any other evidence. — In prosecution for distributing obscene material, when the magazine depicted two women and a man engaging in sexual activity, the "prurient interest" standard did not have to be considered with regard to its appeal to a "bizarre deviant group," and the jury could adequately apply the standard without any evidence designed to guide the jury in applying the standard. *134 Baker St., Inc. v. State*, 172 Ga. App. 738, 324 S.E.2d 575 (1984).

Jury may consider setting in which publication was presented to public, and view publications against a background of commercial exploitation of erotica solely for sake of their prurient appeal. *Whisenhunt v. State*, 156 Ga. App. 583, 275 S.E.2d 82 (1980).

Instruction evaluating societal worth of work. — Trial court was not required to charge the jury as to the proper procedure for evaluating the societal value of a work beyond charging the language contained in O.C.G.A. § 16-12-80(b). *Lee v. State*, 214 Ga. App. 164, 447 S.E.2d 323 (1994).

Methods of creation, promotion, or dissemination are relevant in determining whether materials are obscene. *Whisenhunt v. State*, 156 Ga. App. 583, 275 S.E.2d 82 (1980).

Evidence of pandering to prurient interest in creation, promotion or dissemination of material is relevant in determining whether the material is obscene. *Showcase Cinemas, Inc. v. State*, 156 Ga. App. 225, 274 S.E.2d 578 (1980).

Jury can find material obscene if the jury finds the material was pandered, that is, the distribution was a "commercial exploitation of erotica solely for the sake of their prurient appeal". This phrase has come to be known as the "Ginzburg pandering instruction". *Whisenhunt v. State*, 156 Ga. App. 583, 275 S.E.2d 82 (1980).

Method of commercial dissemination may warrant finding of obscenity. — In a close case where there is a valid argument of the existence of some slight social value of a literary, historical, artistic, or technical nature, a finding of obscenity will not be made even though

Application (Cont'd)**2. Considerations in Determining Obscenity (Cont'd)**

the book is found to possess requisite prurient appeal and to be patently offensive unless there is also clear evidence that material has passed threshold of permitted exposure in that its commercial dissemination amounts to pandering, or it is made available to juveniles, or it becomes impossible for unwilling individual to avoid exposure. *Fishman v. State*, 128 Ga. App. 505, 197 S.E.2d 467 (1973).

Expert testimony is not necessary to prove obscenity of sexual devices; nevertheless, the Court of Appeals has recognized the use of witnesses to testify that certain devices are designed primarily for stimulation of genital organs. *Williams v. State*, 157 Ga. App. 494, 277 S.E.2d 781 (1981).

3. Determination of Number of Offenses Committed

Single sale of two obscene magazines as one offense. — Single sale of two obscene magazines made by one seller to one buyer in one transaction at same time and place is only one offense. *Adult Bookmart, Inc. v. State*, 152 Ga. App. 838, 264 S.E.2d 273 (1979), cert. denied, 449 U.S. 886, 101 S. Ct. 240, 66 L. Ed. 2d 114 (1980).

Each showing of obscene film constitutes a separate offense. — Double jeopardy rights are not denied when defendant is convicted of multiple offenses for numerous showings of an obscene film. A separate offense occurs each time the obscene film is shown. *Dyke v. State*, 232 Ga. 817, 209 S.E.2d 166 (1974), cert. denied, 421 U.S. 952, 95 S. Ct. 1687, 44 L. Ed. 2d 106 (1975).

Each showing of each film in coin-operated booths constitutes separate violation. — When allegedly obscene films seized by investigators were shown either in separate booths or two films to a booth, the booths were coin-operated and required that a number of coins be deposited before full length of a particular film could be viewed, each showing of each film constituted a separate and distinct violation. *G & E Bus. Servs., Inc. v. State*, 156 Ga. App. 391, 274 S.E.2d 644 (1980).

Single, uninterrupted, continuous showing of multiple films as part of single exhibition constitutes one offense. *Maxwell v. State*, 152 Ga. App. 776, 264 S.E.2d 254 (1979), cert. denied, 449 U.S. 889, 101 S. Ct. 245, 66 L. Ed. 2d 114 (1980); *G & E Bus. Servs., Inc. v. State*, 156 Ga. App. 391, 274 S.E.2d 644 (1980).

Continuing sales on intermittent basis constitute single scheme. — When purpose and intent of entire operation is the continuing sale of pornographic material, whether sales are made on a minute-by-minute basis, a day-by-day basis, or on an intermittent basis, this type of operation is similar to a "fence" who deals in trafficking of stolen goods. Such receiver and seller of stolen goods deals with whomever and wherever the opportunity presents itself, on an intermittent basis, to carry out a singular purpose and plan. These continuing sales, on an intermittent basis, constitute a single scheme or plan for purpose of single prosecution. *Whisenhunt v. State*, 156 Ga. App. 583, 275 S.E.2d 82 (1980).

Sales of two magazines at different times on same date to same buyer constitutes two offenses. *Stancil v. State*, 155 Ga. App. 731, 272 S.E.2d 511 (1980), cert. denied, 451 U.S. 975, 101 S. Ct. 2058, 68 L. Ed. 2d 357 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 50 Am. Jur. 2d, Lewdness, Indecency, and Obscenity, §§ 4 et seq., 33.

C.J.S. — 67 C.J.S., Obscenity, § 1 et seq.

ALR. — Exclusion from evidence of parts of a publication, or mail matter,

other than those charged to be obscene, or oral testimony relating to purpose or effect of publication as a whole, 69 ALR 644.

Constitutional guaranties of freedom of speech and of the press as applied to statutes and ordinances providing for licensing or otherwise regulating distribu-

tion of printed matter or solicitation of subscriptions therefor, 127 ALR 962.

Modern concept of obscenity, 5 ALR3d 1158.

Admissibility of evidence of public-opinion polls or surveys in obscen-

ity prosecutions on issue whether materials in question are obscene, 59 ALR5th 749.

Constitutionality of state statutes banning distribution of sexual devices, 94 ALR5th 497.

16-12-81. Distribution of material depicting nudity or sexual conduct; penalty.

(a) A person commits the offense of distributing material depicting nudity or sexual conduct when he sends unsolicited through the mail or otherwise unsolicited causes to be delivered material depicting nudity or sexual conduct to any person or residence or office unless there is imprinted upon the envelope or container of such material in not less than eight-point boldface type the following notice:

“Notice — The material contained herein depicts nudity or sexual conduct. If the viewing of such material could be offensive to the addressee, this container should not be opened but returned to the sender.”

(b) As used within this Code section, the term:

(1) “Nudity” means the showing of the human male or female genitals, pubic area, or buttocks with less than a full opaque covering or the depiction of covered male genitals in a discernibly turgid state.

(2) “Sexual conduct” means acts of masturbation, homosexuality, sodomy, sexual intercourse, or physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks, or, if the person is female, breast.

(c) A person who commits the offense of distributing material depicting nudity or sexual conduct, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than three years or by a fine not to exceed \$10,000.00, or both. (Code 1933, § 26-2102, enacted by Ga. L. 1970, p. 173, § 1.)

Cross references. — Constitutional guarantee of free speech and press, Ga. Const. 1983, Art. I, Sec. I, Para. V.

Law reviews. — For comment on a nuisance abatement statute applied to authorize prior restraint on exhibition of unnamed films, in the future as violative

of the federal Constitution in *Universal Amusement Co. v. Vance*, 587 F.2d 159 (5th Cir. 1978), probable jurisdiction noted, 442 U.S. 928, 99 S. Ct. 2857, 61 L. Ed. 2d 295 (1979), *aff’d*, 445 U.S. 308, 100 S. Ct. 1156, 63 L. Ed. 2d 413 (1980), see 13 Ga. L. Rev. 1076 (1979).

JUDICIAL DECISIONS

Cited in *Fishman v. State*, 229 Ga. 133, 189 S.E.2d 429 (1972).

RESEARCH REFERENCES

Am. Jur. 2d. — 50 Am. Jur. 2d, Lewdness, Indecency and Obscenity, §§ 11 et seq., 16 et seq.

ALR. — Exclusion from evidence of parts of a publication, or mail matter, other than those charged to be obscene, or oral testimony relating to purpose or effect of publication as a whole, 69 ALR 644.

What amounts to an obscene play or book within prohibition statute, 81 ALR 801.

Constitutional guaranties of freedom of speech and of the press as applied to statutes and ordinances providing for licensing or otherwise regulating distribution of printed matter or solicitation of subscriptions therefor, 127 ALR 962.

Modern concept of obscenity, 5 ALR3d 1158.

Constitutionality of state statutes banning distribution of sexual devices, 94 ALR5th 497.

16-12-82. Public nuisances.

The use of any premises in violation of any of the provisions of this part shall constitute a public nuisance. (Code 1933, § 26-2103, enacted by Ga. L. 1971, p. 344, § 2.)

Cross references. — Definition of public nuisance, § 41-1-2. Procedure for abatement of houses of prostitution, build-

ings used for purposes of lewdness, solicitation of sodomy, T. 41, C. 3.

JUDICIAL DECISIONS

Expression outside defined area is constitutionally protected expression. — Any statute or ordinance which seeks to impose criminal or civil sanctions for exercise of expression that is not obscene cannot withstand a proper constitutional attack for overbreadth. *Sanders v. State*, 231 Ga. 608, 203 S.E.2d 153 (1974).

Suppressing distribution of literature on basis of previous publications. — An injunction is impermissible and unconstitutional where it operates not to redress alleged private wrongs but to suppress, on the basis of previous publications, distributions of literature of any kind. *Sanders v. State*, 231 Ga. 608, 203 S.E.2d 153 (1974).

One obscene book on premises of bookstore does not make entire store obscene. *Sanders v. State*, 231 Ga. 608, 203 S.E.2d 153 (1974).

Padlocking premises based on sale of single obscene publication consti-

tutes prior restraint. — Former Code 1933, § 26-2103 was an unconstitutional prior restraint when construed and applied to authorize padlocking of premises on grounds that sale of single obscene publication rendered premises a nuisance. *660 Lindbergh, Inc. v. City of Atlanta*, 492 F. Supp. 511 (N.D. Ga. 1980) (see O.C.G.A. § 16-12-82).

Closing portion of business after finding violations of this article not prior restraint. — Court's ordering closure of portion of business under nuisance statute after finding instances of lewdness, public indecency, solicitation of sodomy, and sodomy, does not constitute a prior restraint on plaintiffs' rights under U.S. Const., amend. 1. *660 Lindbergh, Inc. v. City of Atlanta*, 492 F. Supp. 511 (N.D. Ga. 1980).

Cited in *Speight v. Slaton*, 415 U.S. 333, 94 S. Ct. 1098, 39 L. Ed. 2d 367 (1974).

RESEARCH REFERENCES

ALR. — Modern concept of obscenity, 5 ALR3d 1158.

Exhibition of obscene motion pictures as nuisance, 50 ALR3d 969.

Porno shops or similar places disseminating obscene materials as nuisance, 58 ALR3d 1134.

Validity and application of statute au-

thorizing forfeiture of use or closure of real property from which obscene materials have been disseminated or exhibited, 25 ALR4th 395.

Admissibility of evidence of public-opinion polls or surveys in obscenity prosecutions on issue whether materials in question are obscene, 59 ALR5th 749.

16-12-83. Contraband.

Any materials declared to be obscene by this part and advertisements for such materials are declared to be contraband. (Code 1933, § 26-2104, enacted by Ga. L. 1971, p. 344, § 3.)

JUDICIAL DECISIONS

Obscene materials are not contraband per se since mere possession of obscene materials is not illegal. *Warshaw v. Eastman Kodak Co.*, 148 Ga. App. 670, 252 S.E.2d 182 (1979).

Materials become contraband when they are declared obscene by a fact finder or through a pre-seizure adversary hearing. *Lee v. City of Rome*, 866 F. Supp. 545 (N.D. Ga. 1994).

Forfeiture of nonobscene materials improper. — Trial court erred in ordering forfeiture of five videocassette recorders used to copy pornographic videotapes because the videotapes are not inherently

illegal. The General Assembly did not include in the contraband statute any other properties which might be seized or used as evidence in the prosecution of a charge of distributing obscene materials. This express provision indicates by silence that no others were intended to be swept into the net. *Seaman v. State*, 196 Ga. App. 634, 396 S.E.2d 525 (1990).

Proof necessary for return of seized material. — Defendant in trover action for return of allegedly obscene material must show it was contraband. *Warshaw v. Eastman Kodak Co.*, 148 Ga. App. 670, 252 S.E.2d 182 (1979).

RESEARCH REFERENCES

ALR. — Constitutional guaranties of freedom of speech and of the press as applied to statutes and ordinances providing for licensing or otherwise regulating distribution of printed matter or solici-

tion of subscriptions therefor, 127 ALR 962.

Modern concept of obscenity, 5 ALR3d 1158.

16-12-84. Public indecency in plays, nightclub acts, and motion pictures.

Repealed by Ga. L. 1981, p. 915, § 1, effective April 9, 1981.

Editor's notes. — This Code section was based on Code 1933, § 26-2105, enacted by Ga. L. 1971, p. 344, § 4.

16-12-85. Display of restricted film previews to general audiences.

(a) It shall be unlawful for any motion picture theater owner, operator, or projectionist to display to the audience within the theater scenes from a film to be shown at the theater at some future time when the viewing of that film from which the scenes are taken is restricted to adults or requires minors to be accompanied by a parent or guardian. Scenes of such restricted films may be shown within a theater if the audience has been similarly restricted as to viewing age and conditions.

(b) This Code section shall not apply to motion pictures which are not rated as to viewing audience nor to the first display of a preview trailer from any motion picture.

(c) Any person who violates subsection (a) of this Code section shall be guilty of a misdemeanor. (Ga. L. 1973, p. 508, §§ 1-3; Ga. L. 1983, p. 3, § 13.)

PART 2**OFFENSES RELATED TO MINORS GENERALLY****16-12-100. Sexual exploitation of children; reporting violation; forfeiture; penalties.**

(a) As used in this Code section, the term:

(1) "Minor" means any person under the age of 18 years.

(2) "Performance" means any play, dance, or exhibit to be shown to or viewed by an audience.

(3) "Producing" means producing, directing, manufacturing, issuing, or publishing.

(4) "Sexually explicit conduct" means actual or simulated:

(A) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(B) Bestiality;

(C) Masturbation;

(D) Lewd exhibition of the genitals or pubic area of any person;

(E) Flagellation or torture by or upon a person who is nude;

(F) Condition of being fettered, bound, or otherwise physically restrained on the part of a person who is nude;

(G) Physical contact in an act of apparent sexual stimulation or gratification with any person's unclothed genitals, pubic area, or buttocks or with a female's nude breasts;

(H) Defecation or urination for the purpose of sexual stimulation of the viewer; or

(I) Penetration of the vagina or rectum by any object except when done as part of a recognized medical procedure.

(5) "Visual medium" means any film, photograph, negative, slide, magazine, or other visual medium.

(b)(1) It is unlawful for any person knowingly to employ, use, persuade, induce, entice, or coerce any minor to engage in or assist any other person to engage in any sexually explicit conduct for the purpose of producing any visual medium depicting such conduct.

(2) It is unlawful for any parent, legal guardian, or person having custody or control of a minor knowingly to permit the minor to engage in or to assist any other person to engage in sexually explicit conduct for the purpose of producing any visual medium depicting such conduct.

(3) It is unlawful for any person knowingly to employ, use, persuade, induce, entice, or coerce any minor to engage in or assist any other person to engage in any sexually explicit conduct for the purpose of any performance.

(4) It is unlawful for any parent, legal guardian, or person having custody or control of a minor knowingly to permit the minor to engage in or to assist any other person to engage in sexually explicit conduct for the purpose of any performance.

(5) It is unlawful for any person knowingly to create, reproduce, publish, promote, sell, distribute, give, exhibit, or possess with intent to sell or distribute any visual medium which depicts a minor or a portion of a minor's body engaged in any sexually explicit conduct.

(6) It is unlawful for any person knowingly to advertise, sell, purchase, barter, or exchange any medium which provides information as to where any visual medium which depicts a minor or a portion of a minor's body engaged in any sexually explicit conduct can be found or purchased.

(7) It is unlawful for any person knowingly to bring or cause to be brought into this state any material which depicts a minor or a portion of a minor's body engaged in any sexually explicit conduct.

(8) It is unlawful for any person knowingly to possess or control any material which depicts a minor or a portion of a minor's body engaged in any sexually explicit conduct.

(c) A person who, in the course of processing or producing visual or printed matter either privately or commercially, has reasonable cause to believe that the visual or printed matter submitted for processing or producing depicts a minor engaged in sexually explicit conduct shall immediately report such incident, or cause a report to be made, to the Georgia Bureau of Investigation or the law enforcement agency for the county in which such matter is submitted. Any person participating in the making of a report or causing a report to be made pursuant to this subsection or participating in any judicial proceeding or any other proceeding resulting therefrom shall in so doing be immune from any civil or criminal liability that might otherwise be incurred or imposed, providing such participation pursuant to this subsection is made in good faith.

(d) The provisions of subsection (b) of this Code section shall not apply to the activities of law enforcement and prosecution agencies in the investigation and prosecution of criminal offenses or to legitimate medical, scientific, or educational activities.

(e)(1) A person who is convicted of an offense under this Code section shall forfeit to the State of Georgia such interest as the person may have in:

(A) Any property constituting or directly derived from gross profits or other proceeds obtained from such offense; and

(B) Any property used, or intended to be used, to commit such offense.

(2) In any action under this Code section, the court may enter such restraining orders or take other appropriate action, including acceptance of performance bonds, in connection with any interest that is subject to forfeiture.

(3) The court shall order forfeiture of property referred to in paragraph (1) of this subsection if the trier of fact determines, beyond a reasonable doubt, that such property is subject to forfeiture.

(4) The provisions of subsection (u) of Code Section 16-13-49 shall apply for the disposition of any property forfeited under this subsection. In any disposition of property under this subsection, a convicted person shall not be permitted to acquire property forfeited by such person.

(f)(1) The following property shall be subject to forfeiture to the State of Georgia:

(A) Any material or equipment used, or intended for use, in producing, reproducing, transporting, shipping, or receiving any visual medium in violation of this Code section;

(B) Any visual medium produced, transported, shipped, or received in violation of this Code section, or any material containing such depiction; provided, however, that any such property so forfeited shall be destroyed by the appropriate law enforcement agency after it is no longer needed in any court proceedings; or

(C) Any property constituting or directly derived from gross profits or other proceeds obtained from a violation of this Code section;

except that no property of any owner shall be forfeited under this paragraph, to the extent of the interest of such owner, by reason of an act or omission established by such owner to have been committed or omitted without knowledge or consent of such owner.

(2) The procedure for forfeiture and disposition of forfeited property under this subsection shall be as provided for forfeitures under Code Section 16-13-49.

(g)(1) Except as otherwise provided in paragraph (2) of this subsection, any person who violates a provision of this Code section shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than five nor more than 20 years and by a fine of not more than \$100,000.00. In the event, however, that the person so convicted is a member of the immediate family of the victim, no fine shall be imposed.

(2) Any person who violates subsection (c) of this Code section shall be guilty of a misdemeanor. (Ga. L. 1978, p. 2193, § 1; Ga. L. 1983, p. 1437, § 1; Ga. L. 1987, p. 1164, § 1; Ga. L. 1988, p. 11, §§ 1, 2; Ga. L. 1991, p. 886, § 3; Ga. L. 1995, p. 957, § 6; Ga. L. 1996, p. 6, § 16; Ga. L. 2003, p. 573, § 2.)

Cross references. — Selling, apprenticing persons under age 12 for indecent, obscene, or immoral exhibition, practice, or purpose, § 39-2-17. Employment of minors as actors, or performers in motion pictures, theatrical productions, generally, § 39-2-18.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1988, the correct spelling of “from” was substituted in subparagraph (f)(1)(C).

Editor’s notes. — Ga. L. 1991, p. 886, § 4, not codified by the General Assembly, provides: “(a) The repeal, or repeal and reenactment, of the provisions of Code Section 16-13-49 by this Act shall not abate any cause of action which arose at any previous time under the provisions of said Code section prior to the effective

date of this Act. Furthermore, no action for forfeiture shall be abated as a result of the provisions of this Act, and any and every such action or cause of action shall continue, subject only to the applicable statute of limitations.

“(b) No property shall be subject to forfeiture pursuant to this Act where the act or omission which makes such property subject to forfeiture occurred prior to the effective date of this Act unless such property was subject to forfeiture under the laws of this state at the time such act or omission occurred.”

Ga. L. 1995, p. 957, § 1, not codified by the General Assembly, provides: “This Act shall be known and may be cited as the ‘Child Protection Act of 1995’.”

Law reviews. — For note on the 2003

amendment to this Code section, see 20 Georgia St. U.L. Rev. 84 (2003).

JUDICIAL DECISIONS

Constitutionality. — Term “depict a minor” being construed narrowly, O.C.G.A. § 16-12-100 is not unconstitutional. *Aman v. State*, 261 Ga. 669, 409 S.E.2d 645 (1991).

Enactment of a state statute affecting an area of the law that is not addressed by the federal statute concerning child pornography law (18 U.S.C. § 2251) does not violate the Supremacy Clause of the United States Constitution. *Aman v. State*, 261 Ga. 669, 409 S.E.2d 645 (1991).

For purposes of equal protection analysis, defendant was not similarly situated to defendants who were charged with other crimes against children and was not subject to disparate treatment because O.C.G.A. § 16-12-100 criminalizes conduct involving all children under the age of 18 years, whereas other crimes against children specify a lower age threshold, and in certain instances, implicate only unmarried victims. *Reed v. State*, 264 Ga. App. 466, 448 S.E.2d 189 (1994).

Because the defendant never requested access to the materials seized from the defendant’s home for the purpose of preparing for trial, wherein the defendant was charged with sexual exploitation of children, in violation of O.C.G.A. § 16-12-100(b)(8), the defendant lacked standing to assert that O.C.G.A. § 16-12-100(d) was unconstitutional due to the exemptions allowed therein; the defendant was unable to show that the statute adversely impacted the defendant’s rights. *Tennille v. State*, 279 Ga. 884, 622 S.E.2d 346 (2005).

Despite being time-barred, the defendant’s constitutional challenge to O.C.G.A. § 16-12-100(d) lacked merit as the photographs at issue were made available by the state for inspection, the defense was offered a mirror image of defendant’s hard drive, and counsel never requested a copy of defendant’s digital camera card. *Daly v. State*, 285 Ga. App. 808, 648 S.E.2d 90 (2007), cert. denied, 2007 Ga. LEXIS 659 (Ga. 2007); U.S. , 128 S. Ct. 2441, 171 L. Ed. 2d 241 (2008).

“Depict a minor” construed. — Statutory term “depict a minor” must be understood as limited to any photographic representation that was made of a human being who at that time was a minor and was “engaged in any sexually explicit conduct,” as defined by O.C.G.A. § 16-12-100. *Aman v. State*, 261 Ga. 669, 409 S.E.2d 645 (1991).

Probable cause. — Deputy sheriff was entitled to qualified immunity on the arrestee’s 42 U.S.C. § 1983 Fourth Amendment claim because the deputy sheriff had at least arguable probable cause to arrest the arrestee because the deputy sheriff applied for an arrest warrant for sexual exploitation of children, O.C.G.A. § 16-12-100; when the totality of the circumstances was viewed objectively, a reasonable officer in the deputy sheriff’s position could have believed that the deputy had probable cause to arrest the arrestee based on: (1) the investigations conducted by both the school technology specialists and the sheriff’s office specialist; (2) the images found on the computers used by the arrestee; (3) an interview with the school technology staff; and (4) the doctor’s statement that some of the individuals depicted in the images appeared to be under the age of eighteen years. *Rockel v. Watkins*, No. 7:08-cv-144 (HL), 2009 U.S. Dist. LEXIS 109692 (M.D. Ga. Nov. 24, 2009).

Offenses did not merge. — Trial court properly refused to merge a defendant’s convictions as the offenses of aggravated child molestation and sexual exploitation of children were separate legal offenses and did not merge as a matter of law; the offenses did not merge as a matter of fact as: (1) the defendant was charged with five separate acts of aggravated child molestation, each of which was based on different facts; (2) the 35 convictions of sexual exploitation of children were based on the distinct actions of the defendant creating 32 separate sexually explicit photographic or video images and distributing three other sexually explicit images

over the Internet; and (3) the defendant's creation of sexually explicit images of several of the sex acts that constituted the basis for the aggravated child molestation charges were separate actions warranting a separate charge and conviction as the offenses of aggravated child molestation were completed separately and independently of the defendant photographing or videotaping the acts. *Walthall v. State*, 281 Ga. App. 434, 636 S.E.2d 126 (2006).

Suppression of computer evidence not warranted. — Warrantless seizure of two computers in a defendant's home was authorized by exigent circumstances, specifically, the objectively reasonable concern that the defendant threatened to destroy computer images of child pornography, images that were vulnerable to quick destruction, irreplaceable, and essential to proving that a crime had been committed. *Hesrick v. State*, 308 Ga. App. 363, 707 S.E.2d 574 (2011).

Certain surreptitious photos not within statute. — Surreptitious photos of the genitals of clothed children, visible due to the angle of the camera and the children's open legs, was not within the precise language of O.C.G.A. § 16-12-100(b)(5). *Craft v. State*, 252 Ga. App. 834, 558 S.E.2d 18 (2001), cert. denied, 537 U.S. 1025, 123 S. Ct. 537, 154 L. Ed. 2d 437 (2002).

Admission of photographs showing the victims naked in a bath tub was upheld since the photographs were relevant to show that defendant's interest in the victims was sexual in nature. *Phillips v. State*, 269 Ga. App. 619, 604 S.E.2d 520 (2004).

USB drive with digital photos sufficient for conviction. — Evidence was sufficient to convict the defendant of five counts of sexual exploitation of children beyond a reasonable doubt because the evidence was more than sufficient to exclude every reasonable hypothesis that someone other than the defendant possessed a USB drive when the defendant stayed at a hotel since a forensic computer specialist testified that the date and time imprinted on a photograph taken from a digital camera was recorded from the digital camera's date and time feature; given the specialist's testimony, coupled with

the fact that the defendant possessed several computers, a digital camera, and another USB drive in the defendant's home in Arkansas, a rational trier of fact could find that the defendant took defendant's own photograph from the defendant's home in Arkansas with the defendant's digital camera, saved those photographs to the USB drive, took the USB drive with the defendant to Georgia, where the defendant stayed at the hotel, and inadvertently left the USB drive on the fifth floor of the hotel, and the jury could also conclude that the defendant knowingly possessed material depicting minors engaged in sexually explicit conduct in light of evidence that sexually explicit images of children were saved to the USB drive within seconds of the time two photographs of the defendant were saved to such drive. *Hunt v. State*, 303 Ga. App. 855, 695 S.E.2d 53 (2010).

"Visual medium" construed. — Motion to quash charge of sexual exploitation of children was error as "visual medium," as used in O.C.G.A. § 16-12-100, encompassed digital images of child pornography sent via computer and was thus prohibited conduct. *State v. Brown*, 250 Ga. App. 376, 551 S.E.2d 773 (2001).

Admission of a videotape of defendant masturbating and sexually explicit magazines was upheld because they showed defendant's lustful disposition toward the unlawful sexual activity with which defendant was charged. *Phillips v. State*, 269 Ga. App. 619, 604 S.E.2d 520 (2004).

Attempted sexual exploitation. — Indictment charging defendant with attempted sexual exploitation of children properly alleged that defendant took a substantial step toward the commission of the crime by making arrangements to meet the victim for the purpose of violating the statute and by proceeding to the meeting place. *Dennard v. State*, 243 Ga. App. 868, 534 S.E.2d 182 (2000).

Trial court did not err in concluding that the victim, who subsequently married the defendant, could be compelled to testify against the defendant with regard to the charge of sexual exploitation of children because that charge qualified as a crime against the

person of a minor based upon the public policy expressed in O.C.G.A. § 24-9-23(b), the particular pictures involved in the case, and the specific subsection with which the defendant was charged, O.C.G.A. § 16-12-100(b)(8); the pictures in the defendant's possession showed the victim personally engaged in sexually explicit conduct. *Peck v. State*, 300 Ga. App. 375, 685 S.E.2d 367 (2009).

Evidence sufficient to support conviction. — Defendants' convictions of sexual exploitation of children were supported by evidence that they had taken turns photographing each other as they engaged in sexual intercourse with the victim, who was under 18 years of age at the time, and it was not necessary for the state either to produce the photographs in question or otherwise to prove that the camera had been working properly. *Moua v. State*, 200 Ga. App. 49, 406 S.E.2d 557 (1991).

Defendant was properly convicted of four counts of sexual exploitation of children where there was evidence that defendant's minor daughter had shaved her pubic area and the position of her body in photographs presented a question for jury determination as to whether the photographs depicted a lewd exhibition of the minor's pubic area. These facts constituted adequate evidence to present for jury determination whether defendant's exhibition of photographs was accomplished with intent to sell. *Uden v. State*, 218 Ga. App. 463, 462 S.E.2d 408 (1995).

Evidence that the minor did not drive a motor vehicle in defendant's presence, and that defendant was aware of the girlish handwriting and phraseology displayed on a greeting card she sent to him and of her appearance and demeanor was sufficient to prove that defendant knew the minor was under 18 years of age. *Phagan v. State*, 268 Ga. 272, 486 S.E.2d 876 (1997), cert. denied, 522 U.S. 1128, 118 S. Ct. 1079, 140 L. Ed. 2d 136 (1998).

Evidence was sufficient to convict the defendant on two counts of sexual exploitation of children for having taken nude photographs of defendant's two sons. *Loveless v. State*, 245 Ga. App. 555, 538 S.E.2d 464 (2000).

Evidence sufficiently supported defen-

dant's conviction for 12 counts of sexual exploitation of children, in violation of O.C.G.A. § 16-12-100(b)(8), because a consent search led to discovery of home-produced photographs of nude young females on defendant's computer; whether evidence of equal access was sufficient to rebut an inference of possession was a matter for the trier of fact. *Tennille v. State*, 279 Ga. 884, 622 S.E.2d 346 (2005).

Defendant's convictions for aggravated child molestation and sexual exploitation of children were supported by the evidence based on the testimony of two minor victims that the victims engaged in numerous acts of oral and anal sex with the defendant, their identification of themselves in numerous photographs and several videos taken from the defendant's computer files, which depicted the victims engaging in sexually explicit conduct, and the sexually explicit photographs and video recordings. *Walthall v. State*, 281 Ga. App. 434, 636 S.E.2d 126 (2006).

Evidence was sufficient to convict a defendant of sexually exploiting children (O.C.G.A. § 16-12-100(b)(8)) as pictures of the defendant and minors engaged in sexually explicit conduct were on a compact disk found in a vehicle in which the defendant had been riding, and some of the same pornographic images were on a computer disk found in the defendant's home. Thus, the state did not rely solely on the defendant's ownership of the home to prove possession of the pornography. *Clewis v. State*, 293 Ga. App. 412, 667 S.E.2d 158 (2008).

Evidence was sufficient to sustain a defendant's conviction for knowing possession of child pornography under O.C.G.A. § 16-12-100(b)(8) because a technician who reviewed a CD and computer from the defendant's home testified that somebody had deliberately copied sexually explicit images to the CD, and police recovered the defendant's thumb print from the CD containing child pornography. *Dickerson v. State*, 304 Ga. App. 762, 697 S.E.2d 874 (2010).

Charge to jury. — In a prosecution for sexual exploitation of children, the trial court's failure to include in the court's charge the statutory definition of "sexu-

ally explicit conduct” was not error. *Rice v. State*, 243 Ga. App. 143, 531 S.E.2d 182 (2000).

Severance of exploitation counts from molestation, battery counts not required. — Because a case charged in two indictments, one for child molestation and aggravated sexual battery against a defendant’s daughter and one for the defendant’s possession of digital and print materials depicting a minor engaged in sexually explicit conduct in violation of O.C.G.A. § 16-12-100(b)(8), was not so complex as to impair the jury’s ability to distinguish the evidence and apply the law intelligently to the counts as joined, the trial court did not abuse the court’s discretion in denying the defendant’s motion to sever. *Dickerson v. State*, 304 Ga. App. 762, 697 S.E.2d 874 (2010).

Evidence was insufficient to warrant a conviction under O.C.G.A. § 16-12-100(b)(8) since there was no evidence that the defendant, who entered a bedroom while the codefendant photographed young girls in the nude, knowingly possessed or controlled the picture which the codefendant took of the girls. *Conejo v. State*, 189 Ga. App. 14, 374 S.E.2d 826 (1988).

Because the mere existence of pornographic images in the cache files of an individual’s computer was insufficient to constitute knowing possession of those materials, absent proof that the individual either: (1) took some affirmative act to save or download those images to the computer; or (2) had knowledge that the computer automatically saved those files, the evidence could not support the defendant’s convictions for knowing possession of child pornography under O.C.G.A. § 16-12-100(b)(8). *Barton v. State*, 286 Ga. App. 49, 648 S.E.2d 660 (2007), cert. denied, 2007 Ga. LEXIS 622 (Ga. 2007).

Evidence insufficient to support conviction. — Photographs of a minor child or children who are wearing short pants or swim trunks, sitting down with legs open with the child’s genitals partially or completely observable; nor photos of children playing outside in various stages of nudity because they were swimming; nor photographs depicting sleeping minor children whose genitals are par-

tially exposed; nor a photo of a partially nude minor child climbing a wall constitute a violation of O.C.G.A. § 16-12-100. *Craft v. State*, 252 Ga. App. 834, 558 S.E.2d 18 (2001), cert. denied, 537 U.S. 1025, 123 S. Ct. 537, 154 L. Ed. 2d 437 (2002).

When the state failed to present evidence that defendant used the victim for the purpose of producing any visual medium depicting any sexually explicit conduct, the evidence was insufficient to support conviction for sexual exploitation. *Phillips v. State*, 269 Ga. App. 619, 604 S.E.2d 520 (2004).

State failed to establish 10 of 12 counts of misdemeanor sexual exploitation of children, O.C.G.A. § 16-12-100(b)(8), because the individuals in the photos were either not fully visible or were so mature that more evidence was required to show that the individuals were under 18, and thus the state failed to establish that the photos possessed by defendant depicted minors; the evidence was sufficient on the two remaining counts for the jury to find that defendant possessed the computer disks containing the photos, and the fact of the subjects’ minority was evident without expert testimony or other evidence. *Abernathy v. State*, 278 Ga. App. 574, 630 S.E.2d 421 (2006).

Evidence was insufficient to show that the defendant knew that the victim was under 18 years of age; the victim was not on trial, the defendant testified that the victim told the defendant that the victim was 22 years old, and photos showing the defendant and the victim did not show beyond a reasonable doubt that the victim was under age. *Berry v. State*, 281 Ga. App. 424, 636 S.E.2d 150 (2006).

Court not constrained to view evidence as a whole. — Court is not constrained to view as a whole evidence pertaining to the sexual portrayal of children. *Craft v. State*, 252 Ga. App. 834, 558 S.E.2d 18 (2001), cert. denied, 537 U.S. 1025, 123 S. Ct. 537, 154 L. Ed. 2d 437 (2002).

Production of tape of sexual assault in civil suit was not criminalized. — In a civil premises liability action arising from a sexual assault on a minor in which a manager sought production of a video-

tape of the assault made by the assailants, O.C.G.A. § 16-12-100(b)(5) did not criminalize the act of producing the tape in response to a court order or a request for discovery, and the trial court erred in holding otherwise. *Alexander Props. Group, Inc. v. Doe*, 280 Ga. 306, 626 S.E.2d 497 (2006).

Sentence term of 220 years to serve upheld but chemical castration not authorized. — Trial court properly sentenced defendant to 220 years to serve, followed by 20 years of probation, on 24 counts of sexual exploitation of a child as such a sentence was within the statutory parameters and did not shock the appellate court's conscience in light of the crimes committed and, in fact, defendant was actually spared serving the maximum amount of prison time authorized by O.C.G.A. § 16-12-100(g)(1). However, the trial court erred by ordering defendant to undergo chemical castration under O.C.G.A. § 16-6-4(d)(2) since such punishment was only for defendants convicted of child molestation. *Bennett v. State*, 292 Ga. App. 382, 665 S.E.2d 365 (2008).

Mandatory minimum sentence proper. — Because defendant possessed a video of a minor engaged in sexual acts while bound and restrained, under O.C.G.A. § 17-10-6.2(c)(1)(F), which disallowed deviation from the mandatory minimum sentence if the victim was restrained during the sexual acts, the trial

court was foreclosed from deviating from the mandatory minimum sentence. *Tindell v. State*, 306 Ga. App. 595, 703 S.E.2d 57 (2010).

Mandatory minimum sentence improper. — Trial court erred in determining that the court was without discretion to deviate from the minimum sentencing requirements of O.C.G.A. § 17-10-6.2(b), and the court of appeals erred in affirming that ruling because the defendants were charged with possession of material in violation of O.C.G.A. § 16-12-100(b)(8) and, therefore, it would have to be shown that the child victims in the images that were stored in the defendants' computers were physically restrained at the same time that the defendants possessed the offending material in order for O.C.G.A. § 17-10-6.2(c)(1)(F) to exclude the trial court from having the sentencing discretion set forth in O.C.G.A. § 17-10-6.2(c)(1), but no such evidence existed; O.C.G.A. § 17-10-6.2(c)(1)(F) precludes the trial court from exercising sentencing discretion when the victim was physically restrained during the commission of the offense, and the use of the words "during the commission of the offense" in O.C.G.A. § 17-10-6.2(c)(1)(F) must be given effect. *Hedden v. State*, 288 Ga. 871, 708 S.E.2d 287 (2011).

Cited in *State v. Jones*, 283 Ga. App. 539, 642 S.E.2d 183 (2007); *Matiatos v. State*, 301 Ga. App. 573, 688 S.E.2d 385 (2009).

RESEARCH REFERENCES

ALR. — Validity, construction, and application of statutes regulating sexual performance by child, 21 ALR4th 239; 42 ALR5th 291.

Admissibility of expert testimony as to criminal defendant's propensity toward sexual deviation, 42 ALR4th 937.

Validity, construction, and application

of state statutes prohibiting child luring as applied to cases involving luring of child by means of verbal or other nonelectronic communications, 33 ALR6th 373.

Construction and application of United States Sentencing Guideline § 2G2.1 et seq., pertaining to child pornography, 145 ALR Fed. 481.

16-12-100.1. Electronically furnishing obscene material to minors.

(a) As used in this Code section, the term:

(1) "Bulletin board system" means a computer data and file service that is accessed by telephone line to store and transmit information.

(2) “CD-ROM” means a compact disc with read only memory which has the capacity to store audio, video, and written materials and is used by computers to reveal the above-said material.

(3) “Electronically furnishes” means:

(A) To make available by electronic storage device, including floppy disks and other magnetic storage devices, or by CD-ROM; or

(B) To make available by allowing access to information stored in a computer, including making material available by operating a computer bulletin board.

(4) “Harmful to minors” means that quality of description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it:

(A) Taken as a whole, predominantly appeals to the prurient, shameful, or morbid interest of minors;

(B) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

(C) Is, when taken as a whole, lacking in serious literary, artistic, political, or scientific value for minors.

(5) “Minor” means an unmarried person younger than 18 years of age.

(6) “Sadomasochistic abuse” means flagellation or torture by or upon a person who is nude or clad in undergarments or in revealing or bizarre costume or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed.

(7) “Sexual conduct” means human masturbation, sexual intercourse, or any touching of the genitals, pubic areas, or buttocks of the human male or female or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification.

(8) “Sexual excitement” means the condition of human male or female genitals or the breasts of the female when in a state of sexual stimulation.

(b) A person commits the crime of electronically furnishing obscene materials to minors if:

(1) Knowing or having good reason to know the character of the material furnished, the person electronically furnishes to an individual whom the person knows or should have known is a minor:

(A) Any picture, photograph, drawing, or similar visual representation or image of a person or portion of a human body which

depicts sexually explicit nudity, sexual conduct, or sadomasochistic abuse and which is harmful to minors; or

(B) Any written or aural matter that contains material of the nature described in subparagraph (A) of this paragraph or contains explicit verbal descriptions or narrative accounts of sexual conduct, sexual excitement, or sadomasochistic abuse;

(2) The offensive portions of the material electronically furnished to the minor are not merely an incidental part of an otherwise nonoffending whole;

(3) The material furnished to the minor, taken as a whole, lacks serious literary, artistic, political, or scientific value; and

(4) The material furnished to the minor, taken as a whole, is harmful to minors in that it appeals to and incites prurient interest.

(c) Any person who violates this Code section shall be guilty of a misdemeanor of a high and aggravated nature. (Code 1981, § 16-12-100.1, enacted by Ga. L. 1993, p. 735, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1993, “system” was substituted for “systems” in paragraph (a)(1).

Law reviews. — For article, “‘Sexing’ to Minors in a Rapidly Evolving Digital Age: Frix v. State Establishes the Applica-

bility of Georgia’s Obscenity Statutes to Text Messages,” see 61 Mercer L. Rev. 1283 (2010).

For note on 1993 enactment of this Code section, see 10 Georgia St. U.L. Rev. 104 (1993).

JUDICIAL DECISIONS

Text messages do not qualify. — Sending a text message over a cellular phone does not meet the definition of “electronically furnishes” set forth in O.C.G.A. § 16-12-100.1(a)(3)(B) as to allowing access to information stored in a computer. *Frix v. State*, 298 Ga. App. 538, 680 S.E.2d 582 (2009).

Required registration as sex offender. — Detective erroneously promised during an interview that a defendant would not be charged with an offense that

required sex offender registration because a conviction for electronically furnishing obscene material to a minor under O.C.G.A. § 16-12-100.1 would require registration as a sex offender under O.C.G.A. § 42-1-12(e)(2); prior to the erroneous promise, the defendant’s confession was voluntarily made under O.C.G.A. § 24-3-50 as the confession was made without the slightest hope of benefit. *State v. Lee*, 295 Ga. App. 49, 670 S.E.2d 879 (2008).

16-12-100.2. Computer or electronic pornography and child exploitation prevention.

(a) This Code section shall be known and may be cited as the “Computer or Electronic Pornography and Child Exploitation Prevention Act of 2007.”

(b) As used in this Code section, the term:

(1) “Child” means any person under the age of 16 years.

(2) “Electronic device” means any device used for the purpose of communicating with a child for sexual purposes or any device used to visually depict a child engaged in sexually explicit conduct, store any image or audio of a child engaged in sexually explicit conduct, or transmit any audio or visual image of a child for sexual purposes. Such term may include, but shall not be limited to, a computer, cellular phone, thumb drive, video game system, or any other electronic device that can be used in furtherance of exploiting a child for sexual purposes;

(3) “Identifiable child” means a person:

(A) Who was a child at the time the visual depiction was created, adapted, or modified or whose image as a child was used in creating, adapting, or modifying the visual depiction; and

(B) Who is recognizable as an actual person by the person’s face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature or by electronic or scientific means as may be available.

The term shall not be construed to require proof of the actual identity of the child.

(4) “Sodomasochistic abuse” has the same meaning as provided in Code Section 16-12-100.1.

(5) “Sexual conduct” has the same meaning as provided in Code Section 16-12-100.1.

(6) “Sexual excitement” has the same meaning as provided in Code Section 16-12-100.1.

(7) “Sexually explicit nudity” has the same meaning as provided in Code Section 16-12-102.

(8) “Visual depiction” means any image and includes undeveloped film and video tape and data stored on computer disk or by electronic means which is capable of conversion into a visual image or which has been created, adapted, or modified to show an identifiable child engaged in sexually explicit conduct.

(c)(1) A person commits the offense of computer or electronic pornography if such person intentionally or willfully:

(A) Compiles, enters into, or transmits by computer or other electronic device;

(B) Makes, prints, publishes, or reproduces by other computer or other electronic device;

(C) Causes or allows to be entered into or transmitted by computer or other electronic device; or

(D) Buys, sells, receives, exchanges, or disseminates

any notice, statement, or advertisement, or any child's name, telephone number, place of residence, physical characteristics, or other descriptive or identifying information for the purpose of offering or soliciting sexual conduct of or with an identifiable child or the visual depiction of such conduct.

(2) Any person convicted of violating paragraph (1) of this subsection shall be punished by a fine of not more than \$10,000.00 and by imprisonment for not less than one nor more than 20 years.

(d)(1) It shall be unlawful for any person intentionally or willfully to utilize a computer on-line service or Internet service, including but not limited to a local bulletin board service, Internet chat room, e-mail, on-line messaging service, or other electronic device, to seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice a child or another person believed by such person to be a child to commit any illegal act described in Code Section 16-6-2, relating to the offense of sodomy or aggravated sodomy; Code Section 16-6-4, relating to the offense of child molestation or aggravated child molestation; Code Section 16-6-5, relating to the offense of enticing a child for indecent purposes; or Code Section 16-6-8, relating to the offense of public indecency or to engage in any conduct that by its nature is an unlawful sexual offense against a child.

(2) Any person who violates paragraph (1) of this subsection shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than 20 years and by a fine of not more than \$25,000.00; provided, however, that, if at the time of the offense the victim was 14 or 15 years of age and the defendant was no more than three years older than the victim, then the defendant shall be guilty of a misdemeanor of a high and aggravated nature.

(e)(1) A person commits the offense of obscene Internet contact with a child if he or she has contact with someone he or she knows to be a child or with someone he or she believes to be a child via a computer on-line service or Internet service, including but not limited to a local bulletin board service, Internet chat room, e-mail, or on-line messaging service, and the contact involves any matter containing explicit verbal descriptions or narrative accounts of sexually explicit nudity, sexual conduct, sexual excitement, or sadomasochistic abuse that is intended to arouse or satisfy the sexual desire of either the child or the person, provided that no conviction shall be had for a violation of this subsection on the unsupported testimony of a child.

(2) Any person who violates paragraph (1) of this subsection shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than ten years or by a fine of not more than \$10,000.00; provided, however, that, if at the time of the offense the victim was 14 or 15 years of age and the defendant was no more than three years older than the victim, then the defendant shall be guilty of a misdemeanor of a high and aggravated nature.

(f)(1) It shall be unlawful for any owner or operator of a computer on-line service, Internet service, local bulletin board service, or other electronic device that is in the business of providing a service that may be used to sexually exploit a child to intentionally or willfully to permit a subscriber to utilize the service to commit a violation of this Code section, knowing that such person intended to utilize such service to violate this Code section. No owner or operator of a public computer on-line service, Internet service, local bulletin board service, or other electronic device that is in the business of providing a service that may be used to sexually exploit a child shall be held liable on account of any action taken in good faith in providing the aforementioned services.

(2) Any person who violates paragraph (1) of this subsection shall be guilty of a misdemeanor of a high and aggravated nature.

(g) The sole fact that an undercover operative or law enforcement officer was involved in the detection and investigation of an offense under this Code section shall not constitute a defense to prosecution under this Code section.

(h) A person is subject to prosecution in this state pursuant to Code Section 17-2-1, relating to jurisdiction over crimes and persons charged with commission of crimes generally, for any conduct made unlawful by this Code section which the person engages in while:

(1) Either within or outside of this state if, by such conduct, the person commits a violation of this Code section which involves a child who resides in this state or another person believed by such person to be a child residing in this state; or

(2) Within this state if, by such conduct, the person commits a violation of this Code section which involves a child who resides within or outside this state or another person believed by such person to be a child residing within or outside this state.

(i) Any violation of this Code section shall constitute a separate offense. (Code 1981, § 16-12-100.2, enacted by Ga. L. 1999, p. 232, § 2; Ga. L. 2003, p. 140, § 16; Ga. L. 2003, p. 573, § 3; Ga. L. 2007, p. 47, § 16/SB 103; Ga. L. 2007, p. 283, § 2/SB 98.)

Law reviews. — For note on the 2003 amendment to this Code section, see 20 Georgia St. U.L. Rev. 84 (2003).

JUDICIAL DECISIONS

Offenses prior to effective date. —

To the extent that a defendant's conduct before the effective date of O.C.G.A. § 16-12-100.2 violated criminal statutes already in existence, there is no indication that the legislature intended to prevent prosecution under such statutes simply because the defendant utilized a computer in the commission of the crime. *Dennard v. State*, 243 Ga. App. 868, 534 S.E.2d 182 (2000).

Venue. — Use of computer online services in one county in the State of Georgia, even though the user is in another county, is sufficient to prove venue under O.C.G.A. § 16-12-100.2. *Selfe v. State*, 290 Ga. App. 857, 660 S.E.2d 727 (2008), cert. denied, 2008 Ga. LEXIS 493 (Ga. 2008).

Sex offender registration required.

— Defendant's convictions under the computer pornography and child exploitation act, O.C.G.A. § 16-12-100.2, required defendant to register as a sex offender pursuant to O.C.G.A. § 42-1-12, as defendant's conviction for pornography and child exploitation under O.C.G.A. § 16-12-100.2(d) for the use of an on-line Internet service in the attempt to commit child molestation was within the definition of a "criminal offense against a victim who was a minor," pursuant to O.C.G.A. § 42-1-12; defendant had communicated with a police officer who posed as a 14-year-old girl, sent her sexually explicit messages, and arranged a meeting with her. *Spivey v. State*, 274 Ga. App. 834, 619 S.E.2d 346 (2005).

Crime of child molestation requires victim and accused to be in presence of each other. — Victim and accused must be together in order for the crime of child molestation to be committed pursuant to O.C.G.A. § 16-12-100.2. *Selfe v. State*, 290 Ga. App. 857, 660 S.E.2d 727 (2008), cert. denied, 2008 Ga. LEXIS 493 (Ga. 2008).

Trial court erred by convicting defendant of child molestation, pursuant to O.C.G.A. § 16-12-100.2, with regard to

defendant's actions of engaging in internet communications with an undercover police officer whom defendant thought was a 15-year-old child; the state only set forth that defendant was in one county and the victim was in another, which was insufficient to show that the victim and defendant were in the presence of each other as required by the statute. *Selfe v. State*, 290 Ga. App. 857, 660 S.E.2d 727 (2008), cert. denied, 2008 Ga. LEXIS 493 (Ga. 2008).

Trial court properly refused to apply the rule of lenity with regard to the defendant's conviction under O.C.G.A. § 16-12-100.2(e)(1), and the defendant was not entitled to be convicted of only the misdemeanor offense of furnishing obscene material to a minor, in violation of § 16-12-100.1(b)(1)(B), because the defendant was charged with using Internet services to contact a person believed to be a 15-year-old child and that the contact contained explicit verbal descriptions of sexual conduct that were intended to arouse and satisfy the sexual desires of the defendant; the intent to arouse was not an element included in the misdemeanor offense. *Selfe v. State*, 290 Ga. App. 857, 660 S.E.2d 727 (2008), cert. denied, 2008 Ga. LEXIS 493 (Ga. 2008).

Entrapment not shown by defendant's electronic communication. — Defendant was not entrapped by law enforcement because: (1) the defendant, via electronic communications, asked an undercover officer who was posing as a teenage girl to engage in sexual intercourse and oral sodomy with the defendant, even after the "teenage girl" told the defendant that the teenage girl was 14 years old; (2) the defendant initiated the conversation during which a meeting was arranged and the defendant described in detail the sex acts which the defendant wished to perform on the teenage girl at the park where the two discussed meeting for sex; (3) when the defendant arrived at the park, the defendant possessed a condom on the

defendant's person; and (4) when the officers who stopped the defendant at the park explained that the officers were with a task force for Internet crimes against children, the defendant immediately responded that the defendant was at the park to counsel a 14-year-old girl about the dangers of meeting men from the Internet. *Logan v. State*, No. A10A2100, 2011 Ga. App. LEXIS 230 (Mar. 17, 2011).
Cited in *Barton v. State*, 286 Ga. App. 49, 648 S.E.2d 660 (2007).

RESEARCH REFERENCES

ALR. — Validity of state statutes and administrative regulations regulating internet communications under commerce clause and First Amendment of federal constitution, 98 ALR5th 167.

Validity, construction, and application of state statutes prohibiting child luring as applied to cases involving luring of child by means of verbal or other nonelectronic communications, 35 ALR6th 361.

16-12-100.3. Obscene telephone contact; conviction; penalties.

(a) As used in this Code section, the terms “sexual conduct,” “sexual excitement,” and “sodomasochistic abuse” have the same meanings as provided for those terms in Code Section 16-12-100.1, relating to electronically furnishing obscene materials to minors; the term “sexually explicit nudity” has the same meaning as provided for that term in Code Section 16-12-102, relating to distributing harmful materials to minors; and the term “child” means a person under 14 years of age.

(b) A person 17 years of age or over commits the offense of obscene telephone contact with a child if that person has telephone contact with an individual whom that person knows or should have known is a child, and that contact involves any aural matter containing explicit verbal descriptions or narrative accounts of sexually explicit nudity, sexual conduct, sexual excitement, or sodomasochistic abuse which is intended to arouse or satisfy the sexual desire of either the child or the person, provided that no conviction shall be had for this offense on the unsupported testimony of the victim.

(c)(1) Except as otherwise provided in other paragraphs of this subsection, a person convicted of the offense of obscene telephone contact with a child shall be guilty of a misdemeanor of a high and aggravated nature.

(2) Upon the first conviction of the offense of obscene telephone contact with a child:

(A) If the person convicted is less than 21 years of age, such person shall be guilty of a misdemeanor; or

(B) The judge may probate the sentence without regard to the age of the convicted person, and such probation may be upon the special condition that the defendant undergo a mandatory period of counseling administered by a licensed psychiatrist or a licensed psychologist. However, if the judge finds that such probation should

not be imposed, the judge shall sentence the defendant to imprisonment; provided, further, that upon a defendant's being incarcerated on a conviction for such first offense, the place of incarceration shall provide counseling to such defendant.

(3) Upon a second or subsequent conviction of such offense, the defendant shall be guilty of a felony and punished by imprisonment for not less than one nor more than five years. (Code 1981, § 16-12-100.3, enacted by Ga. L. 2000, p. 1237, § 1.)

Law reviews. — For article, “‘Sexting’ to Minors in a Rapidly Evolving Digital Age: *Frix v. State* Establishes the Applica-

bility of Georgia's Obscenity Statutes to Text Messages,” see 61 Mercer L. Rev. 1283 (2010).

JUDICIAL DECISIONS

Text messages not within ambit of statute. — Defendant was charged with obscene telephone contact with a minor based on text messages of a sexually explicit nature that the defendant had sent by cellular phone. As a text message was

in written format and not capable of being heard, it was not “aural matter” within the meaning of O.C.G.A. § 16-12-100.3(b); therefore, the charge had to be quashed. *Frix v. State*, 298 Ga. App. 538, 680 S.E.2d 582 (2009).

PART 3

SALE OR DISTRIBUTION OF HARMFUL MATERIALS TO MINORS

Editor's notes. — Prior to the effective date of the Code, Ga. L. 1981, p. 1578, § 2, effective July 1, 1981, repealed the provisions originally assigned to this part (codified at §§ 16-12-101 through 16-12-108) and enacted new provisions which were derived principally from Ga. L. 1969, p. 222, § 1 and codified at §§ 16-12-110 through 16-12-113. This part was then repealed and reenacted by Ga. L. 1983, p. 1437, § 2, effective July 1, 1983, by which Act the former §§ 16-12-110 through 16-12-113 were repealed and new §§ 16-12-101 through 16-12-105 were enacted.

Because Ga. L. 1981, p. 1578, § 2 repealed Code sections designated §§ 16-12-101 through 16-12-108 and enacted new Code sections designated as §§ 16-12-110 through 16-12-113, the Code did not originally contain a Code section designated as § 16-12-109. In 2003, the Code Commission reserved § 16-12-109; however, Ga. L. 2007, p. 47, § 16, effective May 11, 2007, repealed the reservation of this Code section.

Law reviews. — For annual survey of criminal law and procedure, see 35 Mercer L. Rev. 103 (1983).

16-12-101. Legislative purpose.

The General Assembly finds that the sale, loan, and exhibition of harmful materials to minors has become a matter of increasingly grave concern to the people of this state. The elimination of such sales, loans, and exhibition and the consequent protection of minors from harmful materials are in the best interest of the morals and general welfare of the citizens of this state in general and of minors in this state in particular. The accomplishment of these ends can best be achieved by

providing public prosecutors with an effective power to commence criminal proceedings against persons who engage in the sale, loan, or exhibition of harmful materials to minors. (Code 1981, § 16-12-101, enacted by Ga. L. 1983, p. 1437, § 2.)

JUDICIAL DECISIONS

Constitutionality. — Decision in *American Booksellers Ass'n v. Webb*, 643 F. Supp. 1546 (N.D. Ga. 1986), invalidating the display provision of O.C.G.A. Pt. 3, Ch. 12, T. 16 does not prohibit the state

from prosecuting a defendant for violating the exhibition, distribution, and definition components of that part. *Hunter v. State*, 257 Ga. 571, 361 S.E.2d 787 (1987).

16-12-102. Definitions.

As used in this part, the term:

(1) "Harmful to minors" means that quality of description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it:

(A) Taken as a whole, predominantly appeals to the prurient, shameful, or morbid interest of minors;

(B) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

(C) Is, when taken as a whole, lacking in serious literary, artistic, political, or scientific value for minors.

(2) "Knowingly" means having a general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

(A) The character and content of any material described in this part which is reasonably susceptible to examination by the defendant; and

(B) The age of the minor; provided, however, that an honest mistake shall constitute an excuse from liability in this part if the defendant made a reasonable, bona fide attempt to ascertain the true age of such minor.

(3) "Minor" means a person less than 18 years of age.

(4) "Sadomasochistic abuse" means actual or simulated flagellation or torture by or upon a person who is nude, clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound, or otherwise physically restrained by one so clothed or nude.

(5) "Sexual conduct" means actual or simulated acts of masturbation, homosexuality, sexual intercourse, or physical contact in an act

of apparent sexual stimulation or gratification with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is female, breasts.

(6) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(7) "Sexually explicit nudity" means a state of undress so as to expose the human male or female genitals, pubic area, or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state. (Code 1981, § 16-12-102, enacted by Ga. L. 1983, p. 1437, § 2; Ga. L. 1984, p. 1495, § 3; Ga. L. 1996, p. 6, § 16.)

JUDICIAL DECISIONS

Constitutionality. — Definition of material targeted in O.C.G.A. § 16-12-102 does not involve "legislative overkill"; the definition employs a narrowly crafted adaptation of the current definition of adult obscenity announced by the United States Supreme Court in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973). *American Booksellers v. Webb*, 919 F.2d 1493 (11th Cir. 1990), cert. denied, 500 U.S. 941, 111 S. Ct. 2237, 114 L. Ed. 2d 479 (1991).

O.C.G.A. § 16-12-102 covers only material unprotected to minors and is not so indeterminate that the statute unduly chills protected expression. *American Booksellers v. Webb*, 919 F.2d 1493 (11th Cir. 1990).

"Obscene" work viewed "as a whole." — The O.C.G.A. § 16-12-103(a)(1) charge against the defendant was based on defendant's exhibiting to a minor an allegedly pornographic motion picture, and the jury was allowed to view a videotape of this motion picture; but at some point during the showing of this film, defense counsel stipulated that the film was sexually explicit, and the remainder of the film was not shown to the jury, as a result of this truncation of the jury's view of the film, there was insufficient evidence under which the jury could have found defendant guilty of this charge since, in order to be

adjudged obscene, the work must depict sexually explicit nudity and be harmful to minors; in order to be adjudged harmful to minors, the work must meet the three-part test set out in O.C.G.A. § 16-12-102(1)(A), (B), and (C) and in order to determine whether the work meets the tests set out in subparagraphs (A) and (C), the work must be viewed "as a whole." *Hunter v. State*, 257 Ga. 571, 361 S.E.2d 787 (1987).

Materials "harmful to minors." — In a prosecution for exhibiting harmful material to a minor, pursuant to the statutory definition, the question for the jury was whether the materials in question were "harmful to minors" under the "prevailing standards in the adult community" and testimony of a defense witness that the materials were not in fact harmful was irrelevant. *Hollis v. State*, 215 Ga. App. 35, 450 S.E.2d 247 (1994).

Watching sexually explicit videotapes with minor. — In a prosecution for child molestation, based on defendant's forcing a minor to watch sexually explicit videotapes with the defendant, the state was not required to prove that the tapes were "obscene" and "harmful to minors." *Stroeining v. State*, 226 Ga. App. 410, 486 S.E.2d 670 (1997).

Cited in *American Booksellers Ass'n v. Webb*, 590 F. Supp. 677 (N.D. Ga. 1984); *Greulich v. State*, 263 Ga. App. 552, 588 S.E.2d 450 (2003).

OPINIONS OF THE ATTORNEY GENERAL

Protection of minors. — Public libraries may be required by legislation to take appropriate action to protect minors

from exposure to materials which fall within the definition of harmful to minors. 1995 Op. Att'y Gen. No. U95-24.

16-12-103. Selling, loaning, distributing, or exhibiting; duties of video game retailers.

(a) It shall be unlawful for any person knowingly to sell or loan for monetary consideration or otherwise furnish or disseminate to a minor:

(1) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct, or sadomasochistic abuse and which is harmful to minors; or

(2) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (1) of this subsection, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, or sadomasochistic abuse and which, taken as a whole, is harmful to minors.

(b)(1) It shall be unlawful for any person knowingly to sell or furnish to a minor an admission ticket or pass or knowingly to admit a minor to premises whereon there is exhibited a motion picture, show, or other presentation which, in whole or in part, depicts sexually explicit nudity, sexual conduct, or sadomasochistic abuse and which is harmful to minors or exhibit any such motion picture at any such premises which are not designed to prevent viewing from any public way of such motion picture by minors not admitted to any such premises.

(2) It shall be unlawful for any person knowingly to sell or to furnish to a person under the age of 21 an admission ticket or pass or knowingly to admit a person under the age of 21 to premises whereon there is exhibited a show or performance which is harmful to minors and which, in whole or in part, consists of sexually explicit nudity on the part of one or more live performers; sexual conduct on the part of one or more live performers; or sadomasochistic abuse on the part of one or more live performers.

(c) It shall be unlawful for any person to falsely represent his or her age to any person mentioned in subsection (a) or subsection (b) of this Code section or to his or her agent with the intent to unlawfully procure any material set forth in subsection (a) of this Code section or with the intent to unlawfully procure such person's admission to any motion picture, show, or other presentation, as set forth in subsection (b) of this Code section.

(d) It shall be unlawful for any person knowingly to make a false representation to any person mentioned in subsection (a) or subsection (b) of this Code section or to his or her agent that he or she is the parent or guardian of any minor or knowingly to make a false representation with respect to the age of another person with the intent to unlawfully procure for such other person any material set forth in subsection (a) of this Code section or with the intent to unlawfully procure such other person's admission to any motion picture, show, or other presentation, as set forth in subsection (b) of this Code section.

(e) It shall be unlawful for any person knowingly to exhibit, expose, or display in public at newsstands or any other business or commercial establishment or at any other public place frequented by minors or where minors are or may be invited as part of the general public:

(1) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct, or sadomasochistic abuse and which is harmful to minors; or

(2) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (1) of this subsection, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, or sadomasochistic abuse and which, taken as a whole, is harmful to minors.

(f)(1) As used in this subsection, the term:

(A) "Video game" means an object or device that stores recorded data or instructions, receives data or instructions generated by a person who uses it, and, by processing the data or instructions, creates an interactive game capable of being played, viewed, or experienced on or through a computer, gaming system, console, or other technology.

(B) "Video game retailer" means a person who sells or rents video games to the public.

(2) Every video game retailer shall post a sign providing information to consumers about any video game rating system which appears on a video game offered by such retailer. The sign shall be posted in a conspicuous place within the portion of the establishment dedicated to the display or advertisement of video games. Each video game retailer shall make available to consumers, upon request, written information explaining each such rating system.

(3) A person violating the provisions of this subsection shall be punished with a civil fine in an amount not less than \$250.00 and not more than \$500.00 for each violation. Each day in violation of this

subsection shall constitute a separate offense. (Code 1981, §§ 16-12-103, 16-12-104, enacted by Ga. L. 1983, p. 1437, § 2; Ga. L. 1984, p. 22, § 16; Ga. L. 1984, p. 1495, § 3; Ga. L. 1996, p. 273, § 2; Ga. L. 2005, p. 1261, § 1/SB 106.)

Editor's notes. — The provisions of the subsection (b) added by the second 1984 amendment were derived in great part from the provisions of former Code Section 16-12-104. See editor's notes to that Code section.

Ga. L. 1996, p. 273, § 3, not codified by the General Assembly, provides for severability.

Law reviews. — For article on 2005 amendment of this Code section, see 22 Georgia St. U.L. Rev. 57 (2005). For article, "‘Sexting’ to Minors in a Rapidly

Evolving Digital Age: *Frix v. State* Establishes the Applicability of Georgia's Obscenity Statutes to Text Messages," see 61 Mercer L. Rev. 1283 (2010).

For review of 1996 offenses against public health and morals legislation, see 13 Georgia St. U.L. Rev. 116 (1996). For note, "Balancing the First Amendment and Child Protection Goals in Legal Approaches to Restricting Children's Access to Violent Video Games: A Comparison of Germany and the United States," see 34 Ga. J. Int'l & Comp. L. 743 (2006).

JUDICIAL DECISIONS

Constitutionality. — O.C.G.A. § 16-12-103 produces only a slight burden on adults' access to protected material and fully comports with the First Amendment. *American Booksellers v. Webb*, 919 F.2d 1493 (11th Cir. 1990), cert. denied, 500 U.S. 941, 111 S. Ct. 2237, 114 L. Ed. 2d 479 (1991).

O.C.G.A. § 16-12-103(b)(2) is unconstitutional as an infringement on free speech rights without proof of a compelling state interest justifying such restriction applying to persons between 18 and 21 years of age. *State v. Cafe Erotica, Inc.*, 269 Ga. 486, 500 S.E.2d 574 (1998).

Prosecution for exhibition or definition violations. — State is not prohibited from prosecuting a defendant for violating the exhibition and definition components of O.C.G.A. § 16-12-103, even though the display provision (subsection (e)) has been declared unconstitutional. *Windom v. State*, 187 Ga. App. 18, 369 S.E.2d 311 (1988).

"Obscene" work viewed "as a whole." — When the O.C.G.A. § 16-12-103(a)(1) charge against the defendant was based on defendant's exhibiting to a minor an allegedly pornographic motion picture, and the jury was allowed to view a videotape of this motion picture, which was found during a search of defendant's home, but at some point during the

showing of this film, defense counsel stipulated that the film was sexually explicit, and the remainder of the film was not shown to the jury, as a result of this truncation of the jury's view of the film, there was insufficient evidence under which the jury could have found defendant guilty of this charge since, in order to be adjudged obscene under O.C.G.A. § 16-12-103(a)(1), the work must depict sexually explicit nudity and be harmful to minors; in order to be adjudged harmful to minors, the work must meet the three-part test set out in O.C.G.A. § 16-12-102(1)(A), (B), and (C), and in order to determine whether the work meets the tests set out in subparagraphs (A) and (C) the work must be viewed "as a whole." *Hunter v. State*, 257 Ga. 571, 361 S.E.2d 787 (1987).

Private or noncommercial exhibition to minors. — Charging a defendant with showing an obscene film to a minor does not constitute an unconstitutional intrusion into defendant's right of personal privacy within the private and non-commercial boundaries of defendant's home. *Hunter v. State*, 257 Ga. 571, 361 S.E.2d 787 (1987).

Distribution of text message by cell phone. — Sexually explicit text message sent to a minor via a cellular phone constitutes "printed matter however repro-

duced" under O.C.G.A. § 16-12-103(a)(2). *Frix v. State*, 298 Ga. App. 538, 680 S.E.2d 582 (2009).

As a person of ordinary intelligence would have fair notice that sending a sexually explicit text message to a minor via a cellular phone was unlawful under O.C.G.A. § 16-12-103, prosecuting the defendant for distribution of harmful materials to a minor based on such conduct did not violate due process. *Frix v. State*, 298 Ga. App. 538, 680 S.E.2d 582 (2009).

Placing material "harmful to minors" behind "blinder racks" or shelves which cover at least the lower two-thirds of material that would otherwise be exposed to view does not impose a "substantially overbroad" regulation on "conduct plus speech," where adults may peruse and purchase the material without restriction. *American Booksellers v. Webb*, 919 F.2d 1493 (11th Cir. 1990).

Admission of challenged evidence deemed harmless error. — In a prosecution against the defendant for child molestation, enticing a child for indecent purposes, and exhibiting pornography to a minor, even if the appeals court assumed that the word "catheter" should have been redacted from what the defendant apparently conceded was an otherwise relevant list of items found in a search, the trial court's failure to do so was harmless error

because it was highly improbable that such failure contributed to the verdict given the overwhelming evidence of the defendant's guilt. *Goldey v. State*, 289 Ga. App. 198, 656 S.E.2d 549 (2008).

Rule of lenity did not apply. — There was no merit to a defendant's contention that the defendant's conviction and felony sentence for child molestation were improper because the alleged conduct also violated O.C.G.A. § 16-12-103(a)(1), which makes it a misdemeanor of a high and aggravated nature to furnish or disseminate harmful material to a minor and, therefore, the defendant could only be prosecuted for the misdemeanor offense as the rule of lenity did not apply because the two offenses at issue required different conduct. Namely, the crime of child molestation required, among other things, proof of the intent to arouse or satisfy the sexual desires of either the child or the perpetrator, which was not a required element of the crime of furnishing or disseminating harmful material to a minor. *Metts v. State*, 297 Ga. App. 330, 677 S.E.2d 377 (2009).

Cited in *American Booksellers Ass'n v. Webb*, 590 F. Supp. 677 (N.D. Ga. 1984); *American Booksellers Ass'n v. Webb*, 254 Ga. 399, 329 S.E.2d 495 (1985); *Hollis v. State*, 215 Ga. App. 35, 450 S.E.2d 247 (1994).

RESEARCH REFERENCES

ALR. — Obscenity prosecution: statutory exemption based on dissemination to persons or entities having scientific, educational, or similar justification for possession of such materials, 13 ALR5th 567.

Constitutionality of state statutes banning distribution of sexual devices, 94 ALR5th 497.

16-12-104. Library exception.

The provisions of Code Section 16-12-103 shall not apply to any public library operated by the state or any of its political subdivisions nor to any library operated as a part of any school, college, or university. (Code 1981, § 16-12-104, enacted by Ga. L. 1984, p. 1495, § 3.)

Editor's notes. — This Code section formerly dealt with exhibiting to persons under 18 shows depicting sexually explicit nudity, sexual conduct, or sadomasochis-

tic abuse; see subsection (b) of Code Section 16-12-103 for similar current provisions. The former Code section was enacted by Ga. L. 1983, p. 1437, § 2.

JUDICIAL DECISIONS

Constitutionality. — Exemption for display of materials harmful to minors at libraries does not offend the equal protection clause of the U.S. Constitution. *American Booksellers v. Webb*, 919 F.2d 1493 (11th Cir. 1990), cert. denied, 500 U.S. 941, 111 S. Ct. 2237, 114 L. Ed. 2d 479 (1991).
Cited in *American Booksellers Ass'n v. Webb*, 590 F. Supp. 677 (N.D. Ga. 1984).

OPINIONS OF THE ATTORNEY GENERAL

Protection of minors. — Public libraries may be required by legislation to take appropriate action to protect minors from exposure to materials which fall within the definition of harmful to minors. 1995 Op. Att'y Gen. No. U95-24.

RESEARCH REFERENCES

ALR. — Obscenity prosecution: statutory exemption based on dissemination to persons or entities having scientific, educational, or similar justification for possession of such materials, 13 ALR5th 567.

16-12-105. Penalty.

Any person who violates any provision of Code Section 16-12-103 or 16-12-104 shall be guilty of a misdemeanor of a high and aggravated nature. (Code 1981, § 16-12-105, enacted by Ga. L. 1983, p. 1437, § 2.)

JUDICIAL DECISIONS

Cited in *Metts v. State*, 297 Ga. App. 330, 677 S.E.2d 377 (2009).

16-12-106 through 16-12-108.

Repealed by Ga. L. 1981, p. 1578, § 2, effective July 1, 1981.

Editor's notes. — Code Sections 16-12-106 through 16-12-108 were based on Ga. L. 1969, p. 222, §§ 5-8.

16-12-110 through 16-12-113.

Repealed by Ga. L. 1983, p. 1437, § 2, effective July 1, 1983.

Editor's notes. — Code Sections 16-12-110 through 16-12-113 were based on Ga. L. 1969, p. 222, §§ 1 through 3 and Ga. L. 1981, p. 1578, § 1.

ARTICLE 4

OFFENSES AGAINST PUBLIC TRANSPORTATION

PART 1

GENERAL PROVISIONS

16-12-120. Certain acts in public transit buses, rapid rail cars, or stations; penalty.

(a) A person who commits or attempts to commit any of the following acts in a public transit bus, a rapid rail car, or a rapid rail station or intermodal bus station shall be guilty of a misdemeanor:

(1) Spits, defecates, or urinates;

(2) Discards litter, except into receptacles designated for that purpose;

(3) Smokes tobacco in any form;

(4) Consumes food or beverage or possesses any open food or beverage container, provided that this paragraph shall not apply to resealable beverages in resealable plastic containers, to an operator of a public transit bus at an authorized layover point, or to a person providing food or beverage to any child under age five; provided, further, that nothing in this paragraph shall apply to a rapid rail station or intermodal bus station, unless the public transit system operating such station adopts a policy prohibiting food or beverages in such station; and provided, further, that nothing in this paragraph shall preclude a public transit system operated or funded by a county, municipality, or consolidated government from prohibiting the consumption of any beverage in a public transit bus;

(5) Plays any radio; cassette, cartridge, or tape player; or similar device unless such device is connected to an earphone that limits the sound to the hearing of the individual user;

(6) Carries or possesses any explosives, acids, other dangerous articles, or live animals, except for the following:

(A) A guide dog or service dog as described in Code Section 30-4-2, provided that such guide dog or service dog is accompanied by a physically disabled person, blind person, person with visual disabilities, deaf person, or a person who is responsible for training a guide dog or service dog; and

(B) Small pets confined to rigid pet carriers with locks or latches;

(7) Obstructs, hinders, interferes with, or otherwise disrupts or disturbs the operation, operator, or passengers of a public transit bus or rapid rail car;

(8) Boards any public transit bus through the rear exit door, unless so directed by an employee or agent of the carrier;

(9) Remains aboard any public transit bus or rapid rail car after such vehicle has completed its scheduled route and passengers have been advised to exit the vehicle or remains aboard any public transit bus or rapid rail car after having been warned and after such vehicle has entered a garage or other restricted area not open to the public;

(10) Enters, exits, or passes through any emergency door of any rapid rail car or public transit bus in the absence of a bona fide emergency; or

(11) Enters the operator's cab or driver's seat of any rapid rail car or public transit bus in the absence of a bona fide emergency.

(a.1)(1) It shall be unlawful to solicit money or sell goods or services for a fee to the operator or passengers of a public transit bus or rapid rail car within the confines of such vehicle or within the paid areas of any rapid rail station or intermodal bus station without the express permission or grant of a concession by the public transportation authority or carrier.

(2) It shall be unlawful to deliver or distribute handbills or flyers of a commercial nature to the operator or passengers of a public transit bus or rapid rail car within the confines of such vehicle or within the paid area of any rapid rail station or intermodal bus station.

(3) A person violating the provisions of this subsection shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than \$50.00 and not more than \$100.00. Upon a second or subsequent conviction, a person shall be punished by a fine of not less than \$100.00 and not more than \$250.00 or by imprisonment for not more than ten days, or both.

(b) Employees of a public transportation authority or carrier while at work performing the duties of their employment shall be exempted from the restrictions of paragraphs (8), (9), (10), and (11) of subsection (a) of this Code section.

(c) A person convicted of a first offense of violating subsection (a) of this Code section shall be punished by a fine of not less than \$50.00 and not more than \$100.00. Upon a second or subsequent conviction, a person shall be punished by a fine of not less than \$100.00 and not more than \$250.00 or by imprisonment for not more than ten days, or both.

(d) This Code section shall be cumulative to and shall not prohibit the enactment of any other general and local laws, rules, and regulations of state or local authorities or agencies, and local ordinances prohibiting such activities which are more restrictive than this Code section. (Code 1933, § 26-9911, enacted by Ga. L. 1976, p. 1645, § 1; Ga. L. 1998, p. 890, § 1; Ga. L. 1999, p. 81, § 16; Ga. L. 2001, p. 4, § 16; Ga. L. 2003, p. 338, § 1; Ga. L. 2005, p. 1178, § 1/SB 129; Ga. L. 2009, p. 736, § 1/SB 89; Ga. L. 2010, p. 878, § 16/HB 1387.)

The 2009 amendment, effective July 1, 2009, in paragraph (a)(4), deleted “bottled water” preceding “beverages” near the beginning and inserted “apply to a rapid rail station or intermodal bus station, unless the public transit system operating such station adopts a policy prohibiting food or beverages in such station, and further that nothing in this paragraph shall” near the middle.

The 2010 amendment, effective June 3, 2010, part of an Act to revise, modernize, and correct the Code, in paragraph (a)(4), substituted “provided, further,” for “provided, however,” and substituted “in such station; and provided, further, that” for “in such station, and further that”.

Cross references. — Transportation of passengers by carriers generally, § 46-9-130 et seq. Right of carrier of passengers to refuse admittance to or to eject persons who refuse to comply with regulations of carrier or who exhibit improper conduct, § 46-9-131. Marking of explosives being transported by railroad or otherwise, § 46-9-253.

Editor’s notes. — Ga. L. 2005, p. 1178, § 2, not codified by the General Assembly, provides that the 2005 amendment adding paragraph (a.1) applies to all offenses occurring on and after July 1, 2005.

Law reviews. — For note on the 2003 amendment to this Code section, see 20 Georgia St. U.L. Rev. 91 (2003).

JUDICIAL DECISIONS

Cited in *Kennedy v. State*, 136 Ga. App. 305, 220 S.E.2d 788 (1975).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting of offenders. — An offense under O.C.G.A. § 16-12-120 would not be designated as one which requires fingerprinting. 1998 Op. Att’y Gen. No. 98-20.

Offense under O.C.G.A. § 16-12-120 is not one for which those charged with a violation are to be fingerprinted. 2006 Op. Att’y Gen. No. 2006-2.

16-12-120.1. Altered fare coins, tokens, stored value cards, transfers, transaction cards, and tickets; sale or exchange of tokens, stored value card transfers, transaction cards, or tickets without consent.

A person who commits or attempts to commit any of the following acts shall be guilty of a misdemeanor if such person:

- (1) Sells, makes, or possesses any coin, token, stored value card, transfer, transaction card, ticket, or any other fare medium which has been altered from its original condition contrary to its intended use to enter or gain entry into or on any bus, rail vehicle, or station;

(2) Sells or exchanges any token, stored value card, transfer, transaction card, ticket, fare medium, or similar article which was obtained by fraudulent or illegal means and which is used or to be used as payment for entry into or on any bus, rail vehicle, or terminal without the express consent of the public transit agency owning or operating such vehicles or stations;

(3) Offers entry or provides entry into or on any bus, rapid rail car, or station to any person without the payment of the proper fare to the public transit agency owning or operating such vehicles or stations;

(4) Gains entry into or on any bus, rapid rail car, or station without the payment of the proper fare; or

(5) Gains entry into or on any bus, rapid rail car, or station through the use of a coin, token, transfer, transaction card, ticket, or any other fare medium which is the property of another person when the use of such medium is limited by its terms to a single user. This paragraph shall not apply to stored value cards or similar fare media which deduct the cost of the fare from the value stored on the card or other fare medium each time such card or other fare medium is used. (Code 1981, § 16-12-120.1, enacted by Ga. L. 1992, p. 985, § 1; Ga. L. 1998, p. 890, § 2; Ga. L. 2006, p. 493, § 1/HB 954.)

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting of offenders. — An offense under O.C.G.A. § 16-12-120.1 would not be designated as one which requires fingerprinting. 1998 Op. Att’y Gen. No. 98-20.

PART 2

TRANSPORTATION PASSENGER SAFETY

16-12-121. Short title.

This part shall be known and may be cited as the “Transportation Passenger Safety Act.” (Ga. L. 1978, p. 2238, § 1; Ga. L. 1988, p. 415, § 2; Ga. L. 2002, p. 1094, § 5.)

Editor’s notes. — Ga. L. 2002, p. 1094, § 1, not codified by the General Assembly, provides: “This Act shall be known and may be cited as the ‘Transportation Security Act of 2002.’”

RESEARCH REFERENCES

ALR. — Means of preventing overcrowding of streetcars, 6 ALR 124.
Validity and construction of statute or ordinance specifically criminalizing passenger misconduct on public transportation, 78 ALR4th 1127.

16-12-122. Definitions.

As used in this part, the term:

(1) "Aircraft" means any machine, whether heavier or lighter than air, used or designed for navigation of or flight in the air.

(2) "Avoid a security measure" means to take any action that is intended to result in any person, baggage, container, or item of any type being allowed into a secure area without being subjected to security measures or the assembly of items into an object or substance that is prohibited under the laws of this state or of the United States or any of their agencies, political subdivisions, or authorities after such items have passed through a security measure into a secure area.

(3) "Bus" means any passenger bus or coach or other motor vehicle having a seating capacity of not less than 15 passengers operated by a transportation company for the purpose of carrying passengers or freight for hire.

(4) "Charter" means a group of persons, pursuant to a common purpose and under a single contract and at a fixed charge for the vehicle in accordance with a transportation company's tariff, who have acquired the exclusive use of an aircraft, bus, or rail vehicle to travel together as a group to a specified destination.

(5) "Interfere with a security measure" means to take any action that is intended to defeat, disable, or prevent the full operation of equipment or procedures designed or intended to detect any object or substance, including, but not limited to, disabling of any device so that it cannot fully function, creation of any diversion intended to defeat a security measure, or packaging of any item or substance so as to avoid detection by a security measure.

(6) "Passenger" means any person served by the transportation company; and, in addition to the ordinary meaning of passenger, the term shall include any person accompanying or meeting another person who is transported by such company, any person shipping or receiving freight, and any person purchasing a ticket or receiving a pass.

(7) "Rail vehicle" means any railroad or rail transit car, carriage, coach, or other vehicle, whether self-propelled or not and designed to be operated upon a rail or rails or other fixed right of way by a transportation company for the purpose of carrying passengers or freight or both for hire.

(8) "Secure area" means any enclosed or unenclosed area within a terminal whereby access is restricted in any manner or the posses-

sion of items subject to security measures is prohibited. Access to a secure area may be restricted to persons specifically authorized by law, regulation, or policy of the governing authority or transportation company operating said terminal, and such access into a secure area may be conditioned on passing through security measures, and possession of items may be restricted to designated persons who are acting in the course of their official duties.

(9) “Security measure” means any process or procedure by which employees, agents, passengers, persons accompanying passengers, containers, baggage, freight, or possessions of passengers or persons accompanying passengers are screened, inspected, or examined by any means for the purpose of ensuring the safety and welfare of aircraft, bus, or rail vehicles and the employees, agents, passengers, and freight of any transportation company. The security measures may be operated by or under the authority of any governmental entity, transportation company, or any entity contracting therewith.

(10) “Terminal” means an aircraft, bus, or rail vehicle station, depot, any such transportation facility, or infrastructure relating thereto operated by a transportation company or governmental entity or authority. This term includes a reasonable area immediately adjacent to any designated stop along the route traveled by any coach or rail vehicle operated by a transportation company or governmental entity operating aircraft, bus, or rail vehicle transportation facility and parking lots or parking areas adjacent to a terminal.

(11) “Transportation company” or “company” means any person, group of persons, or corporation providing for-hire transportation to passengers or freight by aircraft, by bus upon the highways in this state, by rail vehicle upon any public or private right of way in this state, or by all, including passengers and freight in interstate or intrastate travel. This term shall also include transportation facilities owned or operated by local public bodies; by municipalities; and by public corporations, authorities, boards, and commissions established under the laws of this state, any of the several states, the United States, or any foreign nation. (Ga. L. 1978, p. 2238, § 2; Ga. L. 1988, p. 415, § 2; Ga. L. 2002, p. 1094, § 5.)

Editor’s notes. — Ga. L. 2002, p. 1094, § 1, not codified by the General Assembly, provides: “This Act shall be known and may be cited as the ‘Transportation Security Act of 2002’.”

JUDICIAL DECISIONS

Cited in GeorgiaCarry.Org, Inc. v. City of Atlanta, 602 F. Supp. 2d 1281 (N.D. Ga. 2008).

RESEARCH REFERENCES

ALR. — Liability of motorbus carrier to alighting at place other than regular bus passenger injured through fall while stop, 7 ALR4th 1031.

16-12-123. Bus or rail vehicle hijacking; boarding with concealed weapon; company use of reasonable security measures.

(a)(1) A person commits the offense of bus or rail vehicle hijacking when he or she:

(A) Seizes or exercises control by force or violence or threat of force or violence of any bus or rail vehicle within the jurisdiction of this state;

(B) By force or violence or by threat of force or violence seizes or exercises control of any transportation company or all or any part of the transportation facilities owned or operated by any such company; or

(C) By force or violence or by threat of force or violence substantially obstructs, hinders, interferes with, or otherwise disrupts or disturbs the operation of any transportation company or all or any part of a transportation facility.

(2) Any person convicted of the offense of bus or rail hijacking shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for life or by imprisonment for not less than one nor more than 20 years.

(b) Any person who boards or attempts to board an aircraft, bus, or rail vehicle with any explosive, destructive device, or hoax device as such term is defined in Code Section 16-7-80; firearm for which such person does not have on his or her person a valid weapons carry license issued pursuant to Code Section 16-11-129 unless possessing such firearm is prohibited by federal law; hazardous substance as defined by Code Section 12-8-92; or knife or other device designed or modified for the purpose of offense and defense concealed on or about his or her person or property which is or would be accessible to such person while on the aircraft, bus, or rail vehicle shall be guilty of a felony and, upon conviction thereof, shall be sentenced to imprisonment for not less than one nor more than ten years. The prohibition of this subsection shall not apply to any law enforcement officer, peace officer retired from a state or federal law enforcement agency, person in the military service of the state or of the United States, or commercial security personnel employed by the transportation company who is in possession of weapons used within the course and scope of employment; nor shall the prohibition apply to persons transporting weapons contained in baggage

which is not accessible to passengers if the presence of such weapons has been declared to the transportation company and such weapons have been secured in a manner prescribed by state or federal law or regulation for the purpose of transportation or shipment. The provisions of this subsection shall not apply to any privately owned aircraft, bus, or rail vehicle if the owner of such aircraft or vehicle has given his or her express permission to board the aircraft or vehicle with the item.

(c) The company may employ reasonable security measures, including any method or device, to detect concealed weapons, explosives, or hazardous material in baggage or freight or upon the person of the passenger. Upon the discovery of any such item or material in the possession of a person, unless the item is a weapon in the possession of a person exempted under subsection (b) of this Code section from the prohibition of that subsection (b), the company shall obtain possession and retain custody of such item or materials until they are transferred to the custody of law enforcement officers. (Ga. L. 1978, p. 2238, § 3; Ga. L. 1982, p. 3, § 16; Ga. L. 1988, p. 415, § 2; Ga. L. 1996, p. 416, § 7; Ga. L. 2002, p. 1094, § 5; Ga. L. 2010, p. 963, § 2-8/SB 308.)

The 2010 amendment, effective June 4, 2010, in subsection (b), inserted “for which such person does not have on his or her person a valid weapons carry license issued pursuant to Code Section 16-11-129 unless possessing such firearm is prohibited by federal law” near the middle of the first sentence, and deleted “their” preceding “employment” in the middle of the second sentence. See the editor’s note for applicability.

Cross references. — Time limitation on prosecutions for crimes punishable by death or life imprisonment, § 17-3-1. Transportation of passengers by carriers generally, § 46-9-130 et seq.

Editor’s notes. — Ga. L. 2002, p. 1094, § 1, not codified by the General Assembly, provides: “This Act shall be known and may be cited as the ‘Transportation Security Act of 2002’.”

Ga. L. 2010, p. 963, § 3-1, not codified by the General Assembly, provides, in part, that the amendment of this Code section shall apply to all offenses committed on and after June 4, 2010, and shall not affect any prosecutions for acts occurring before June 4, 2010, and shall not act as an abatement of any such prosecution.

JUDICIAL DECISIONS

Application to airports. — In a case in which a gun rights organization and a Georgia state representative sought declaratory and injunctive relief because they asserted that Georgia House Bill (HB) 89 permitted any person who possessed a valid Georgia firearms license to carry a firearm in the non-sterile areas of the Hartsfield-Jackson Atlanta International Airport, they argued unsuccessfully that the “notwithstanding” language of HB 89, codified at O.C.G.A. § 16-11-127(e), which authorized Georgia

firearms license (GFL) holders to carry firearms in public transportation notwithstanding O.C.G.A. §§ 16-12-122 through 16-12-127, which is the Transportation Passenger Safety Act (TPSA), would be superfluous unless it was intended to make clear that a GFL holder could carry a firearm in an airport. They misleadingly focused only on O.C.G.A. § 16-12-127, but the “notwithstanding” language in HB 89 referred to all of the TPSA, and O.C.G.A. § 16-12-123(b), another section of the TPSA, prohibited boarding any bus or rail

vehicle with a firearm; since public transportation included bus and rail vehicles such as those operated by Metropolitan Atlanta Rapid Transit Authority, the “notwithstanding” language was needed to make clear that GFL holders could carry firearms onto such vehicles notwithstanding the TPISA. *GeorgiaCarry.Org, Inc. v. City of Atlanta*, 602 F. Supp. 2d 1281 (N.D. Ga. 2008), *aff’d*, 318 Fed. Appx. 851 (11th Cir. 2009).

Evidence supported verdict of guilty but mentally ill on the defendant’s bus hijacking charge as the defendant’s mental illness did not prove legal insanity since the defendant told a psychologist that the defendant grabbed the steering wheel of a moving bus because the driver was in difficulty; a trier of fact could conclude that if the defendant was motivated by a delusion that others were

planning to harm the defendant, the delusion did not justify forcibly exercising control over the bus as the defendant did not tell the psychologist that the defendant took over steering the bus because of the defendant’s fear of being harmed. *Robinson v. State*, 272 Ga. App. 87, 611 S.E.2d 759 (2005).

Evidence was sufficient to convict the defendant of boarding a bus with a concealed weapon under O.C.G.A. § 16-12-123(b) because neither the bus driver nor a police officer detected a gun on defendant while the defendant was on a bus, but during an altercation with the officer immediately after leaving the bus, the defendant was seen striking the officer with a gun. *Smith v. State*, 301 Ga. App. 670, 688 S.E.2d 636 (2009).

Cited in *Herndon v. State*, 277 Ga. App. 374, 626 S.E.2d 579 (2006).

RESEARCH REFERENCES

ALR. — Pocket or clasp knife as deadly or dangerous weapon for purposes of statute aggravating offenses such as assault, robbery, or homicide, 100 ALR3d 287.

What constitutes “dangerous weapon” under statutes prohibiting the carrying of dangerous weapons in motor vehicle, 2 ALR4th 1342.

16-12-124. Removal of baggage, freight, or other items transported by bus or stored in a terminal.

(a) It shall be unlawful to remove any baggage, freight, container, or other item transported upon an aircraft, bus, or rail vehicle or stored in a terminal without consent of the owner of such property or the company or its duly authorized representative. Any person violating this Code section shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years.

(b) The actual value of an item removed in violation of this Code section shall not be material to the crime herein defined. (Ga. L. 1978, p. 2238, § 4; Ga. L. 1988, p. 415, § 2; Ga. L. 2002, p. 1094, § 5.)

Cross references. — Carriage of baggage by carriers of passengers generally, §§ 46-9-136, 46-9-190 et seq.

Editor’s notes. — Ga. L. 2002, p. 1094,

§ 1, not codified by the General Assembly, provides: “This Act shall be known and may be cited as the ‘Transportation Security Act of 2002’.”

JUDICIAL DECISIONS

Evidence sufficient for conviction. — Evidence was sufficient to support a conviction for unlawful removal of baggage from an airport because an airport investigator identified photographs of a person wearing the type of clothing worn

by defendant on the day in question approach the luggage carousel near the time when the missing luggage was supposed to arrive. *Keita v. State*, 285 Ga. 767, 684 S.E.2d 233 (2009).

16-12-125. Avoiding or interfering with securing measures; penalty; exemption.

(a) Except as otherwise provided in this Code section, it shall be unlawful for any person to avoid or interfere with a properly functioning security measure. Any person convicted of a violation of this Code section shall be guilty of a misdemeanor of a high and aggravated nature; provided, however, that any person who violates this Code section with the intent to commit a felony within the terminal or with regard to any aircraft, bus, or rail vehicle shall be punished by imprisonment for not less than five nor more than 25 years, a fine not to exceed \$100,000.00, or both.

(b) Any violation of this Code section shall be considered a separate offense.

(c) This Code section shall not apply to authorized agents of the entity owning or operating such security measure. (Code 1981, § 16-12-125, enacted by Ga. L. 2002, p. 1094, § 5; Ga. L. 2003, p. 423, § 2.)

Editor's notes. — Ga. L. 2002, p. 1094, § 1, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Transportation Security Act of 2002'."

Ga. L. 2002, p. 1094, § 5, effective June 1, 2002, redesignated former Code Section 16-12-125, concerning the effect of the part and civil or criminal proceedings, as present Code Section 16-12-128.

16-12-126. Intentionally interfering with safety or traffic control devices; penalty; exemption.

(a) Except as otherwise provided in this Code section, it shall be unlawful intentionally to disable or inhibit the operation or effectiveness of any properly functioning safety device of any description or to render any item or substance less safe when said item or substance is in any freight of a transportation company, in baggage or possessions of a passenger, or in a terminal.

(b) Except as otherwise provided in this Code section, it shall be unlawful to intentionally render inoperable or partially inoperable for any period of time any properly functioning device designed or operated

for traffic control that is owned, operated, or maintained by or for the benefit of a transportation company.

(c) Any violation of this Code section shall be punished by imprisonment for not less than five nor more than 20 years, a fine not to exceed \$100,000.00, or both.

(d) Any violation of this Code section shall be considered a separate offense.

(e) This Code section shall not apply to authorized agents of the entity owning or operating such safety device or device designed or operated for traffic control. (Code 1981, § 16-12-126, enacted by Ga. L. 2002, p. 1094, § 5; Ga. L. 2003, p. 423, § 3.)

Editor's notes. — Ga. L. 2002, p. 1094, § 1, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Transportation Security Act of 2002'."

16-12-127. Prohibition on firearms, hazardous substances, knives, or other devices; penalty; affirmative defenses.

(a) It shall be unlawful for any person, with the intention of avoiding or interfering with a security measure or of introducing into a terminal any explosive, destructive device, or hoax device as defined in Code Section 16-7-80; firearm for which such person does not have on his or her person a valid weapons carry license issued pursuant to Code Section 16-11-129 unless possessing such firearm is prohibited by federal law; hazardous substance as defined by Code Section 12-8-92; or knife or other device designed or modified for the purpose of offense and defense, to:

(1) Have any such item on or about his or her person, or

(2) Place or cause to be placed or attempt to place or cause to be placed any such item:

(A) In a container or freight of a transportation company;

(B) In the baggage or possessions of any person or any transportation company without the knowledge of the passenger or transportation company; or

(C) Aboard such aircraft, bus, or rail vehicle.

(b) A person violating the provisions of this Code section shall be guilty of a felony and shall, upon conviction, be sentenced to imprisonment for not less than one year nor more than 20 years, a fine not to exceed \$15,000.00, or both. A prosecution under this Code section shall not be barred by the imposition of a civil penalty imposed by any governmental entity.

(c) It is an affirmative defense to a violation of this Code section if a person notifies a law enforcement officer or other person employed to provide security for a transportation company of the presence of such item as soon as possible after learning of its presence and surrenders or secures such item as directed by the law enforcement officer or other person employed to provide security for a transportation company. (Code 1981, § 16-12-127, enacted by Ga. L. 2002, p. 1094, § 5; Ga. L. 2003, p. 423, § 4; Ga. L. 2010, p. 963, § 2-9/SB 308.)

The 2010 amendment, effective June 4, 2010, inserted “for which such person does not have on his or her person a valid weapons carry license issued pursuant to Code Section 16-11-129 unless possessing such firearm is prohibited by federal law” in the middle of the introductory paragraph of subsection (a). See the editor’s note for applicability.

Editor’s notes. — Ga. L. 2002, p. 1094, § 1, not codified by the General Assembly,

provides: “This Act shall be known and may be cited as the ‘Transportation Security Act of 2002’.”

Ga. L. 2010, p. 963, § 3-1, not codified by the General Assembly, provides, in part, that the amendment of this Code section shall apply to all offenses committed on and after June 4, 2010, and shall not affect any prosecutions for acts occurring before June 4, 2010, and shall not act as an abatement of any such prosecution.

16-12-128. Effect of part on other provisions of law; civil or criminal proceedings; restitution.

(a) This part shall be cumulative and supplemental to any other law of this state. A conviction or acquittal under any of the criminal provisions of Code Section 16-12-123, 16-12-124, 16-12-125, or 16-12-126 shall not be a bar to any other civil or criminal proceeding.

(b) In addition to any other penalty imposed by law for a violation of this part, the court may require the defendant to make restitution to any affected public or private entity for the reasonable costs or damages associated with the offense. Restitution made pursuant to this subsection shall not preclude any party from obtaining any other civil or criminal remedy available under any other provision of law. The restitution authorized by this subsection is supplemental and not exclusive. (Ga. L. 1978, p. 2238, § 5; Code 1981, § 16-12-125; Ga. L. 1982, p. 3, § 16; Ga. L. 1988, p. 415, § 2; Code 1981, § 16-12-128, as redesignated by Ga. L. 2002, p. 1094, § 5.)

Editor’s notes. — Ga. L. 2002, p. 1094, § 1, not codified by the General Assembly, provides: “This Act shall be known and

may be cited as the ‘Transportation Security Act of 2002’.”

ARTICLE 5

ABORTION

Cross references. — Parental notification, T. 15, C. 11, A. 3.

Administrative rules and regulations. — Performance of abortions after

the first trimester of pregnancy, Official Compilation of Rules and Regulations of State of Georgia, Rules of Department of Human Resources of Physical Health, Chapter 290-5-32.

Law reviews. — For article, “The Politics of Virtue: Animals, Theology and Abortion,” see 25 Ga. L. Rev. 923 (1991). For article, “Two Decades of Reproductive Freedom Litigation and Activism in Georgia: From Doe v. Bolton to Atlanta v. Operation Rescue,” see 28 Ga. St. B.J. 34 (1991). For article, “Antiprogesterin Drugs: Medical and Legal Issues,” see 42 Mercer L. Rev. 971 (1991).

For note, “The Law of Therapeutic Abortion: A Social Commentary on Proposed Reform,” see 15 J. of Pub. L. 386 (1966). For note on abortion law preceding enactment of current chapter, see 20 Mercer L.

Rev. 314 (1969). For note advocating revision of former Georgia abortion statutes, see 6 Ga. L. Rev. 168 (1971). For note, “What Do We Have Against Parents?: An Assessment of Judicial Bypass Procedures and Parental Involvement in Abortions by Minors,” see 43 Ga. L. Rev. 617 (2009).

For comment on Doe v. Bolton, 319 F. Supp. 1048, (N.D. Ga. 1970), as to unconstitutionality of statutory limitation on reasons for abortion, see 22 Mercer L. Rev. 461 (1971). For comment on Doe v. Bolton, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973), and Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), see 10 Ga. St. B.J. 153 (1973). For comment, “The Trimester Approach: How Long Can the Legal Fiction Last?,” see 35 Mercer L. Rev. 891 (1984).

OPINIONS OF THE ATTORNEY GENERAL

One 18 years of age or older may consent to abortion. — Since age of majority, and consequently age of emancipation from legal custody and control of

parent is 18 years of age, a person 18 years of age or older may consent to an abortion. 1972 Op. Att’y Gen. No. 72-118.

RESEARCH REFERENCES

ALR. — Necessity, to warrant conviction of abortion, that fetus be living at time of commission of acts, 16 ALR2d 949.

Pregnancy as element of abortion or homicide based thereon, 46 ALR2d 1393.

Right of action for injury to or death of woman who consents to illegal abortion, 36 ALR3d 630.

Right of minor to have abortion performed without parental consent, 42 ALR3d 1406.

Validity of state statutes and regulations limiting or restricting public funding for abortions sought by indigent women, 20 ALR4th 1166.

Requisites and conditions of judicial consent to minor’s abortion, 23 ALR4th 1061.

Constitutional right of prisoners to abortion services and facilities — federal cases, 90 ALR Fed. 683.

16-12-140. Criminal abortion.

(a) Except as otherwise provided in Code Section 16-12-141, a person commits the offense of criminal abortion when he administers any medicine, drugs, or other substance whatever to any woman or when he uses any instrument or other means whatever upon any woman with intent to produce a miscarriage or abortion.

(b) A person convicted of the offense of criminal abortion shall be punished by imprisonment for not less than one nor more than ten years. (Ga. L. 1876, p. 113, § 2; Code 1882, § 4337b; Penal Code 1895,

§ 81; Penal Code 1910, § 81; Code 1933, § 26-1101; Code 1933, §§ 26-1201, 26-1203, enacted by Ga. L. 1968, p. 1249, § 1; Code 1933, § 26-1204, enacted by Ga. L. 1973, p. 635, § 1.)

Cross references. — Disciplining of physicians by Composite State Board of Medical Examiners for performing, procuring, or otherwise obtaining criminal abortion, § 43-34-8(a)(8).

Law reviews. — For survey article on criminal law and procedure, see 34 Mercer L. Rev. 89 (1982). For annual survey article discussing developments in criminal law, see 51 Mercer L. Rev. 209 (1999).

JUDICIAL DECISIONS

Constitutionality. — Distinction between the sentences required by the Georgia feticide statute (life sentence) and O.C.G.A. § 16-12-140 is rationally related to legitimate governmental purposes. *Smith v. Newsome*, 815 F.2d 1386 (11th Cir. 1987).

Pregnant woman does not have absolute constitutional right to abortion upon demand. *Doe v. Bolton*, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973).

Viable unborn children have right to protection. — Viable unborn child has right under United States Constitution to protection of state through statutes prohibiting arbitrary termination of life of an unborn fetus. *Jefferson v. Griffin Spalding*

County Hosp. Auth., 247 Ga. 86, 274 S.E.2d 457 (1981).

Conduct of others controlled. — O.C.G.A. § 16-12-140 is specifically directed to prevent the conduct of persons other than the pregnant woman. *Hillman v. State*, 232 Ga. App. 741, 503 S.E.2d 610 (1998).

O.C.G.A. § 16-12-140 is written in the third person, clearly indicating that at least two actions must be involved; therefore, a woman cannot be prosecuted under that statute for allegedly performing a criminal abortion on herself. *Hillman v. State*, 232 Ga. App. 741, 503 S.E.2d 610 (1998).

OPINIONS OF THE ATTORNEY GENERAL

Rights under abortion statutes extend to female inmates in state prisons. — Beyond requirements provided by abortion statute enacted in compliance with holding of *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) and *Doe v. Bolton*, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973), Board of Offender Rehabilitation may not regulate right of

female inmates to have abortions; the board must comply with these statutory requirements in allowing and procuring abortions for female inmates; a failure to permit such abortions under prescribed conditions would lead to an infringement of the female inmates' civil rights as guaranteed under the United States Constitution. 1977 Op. Att'y Gen. No. 77-36.

RESEARCH REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d, Abortion and Birth Control, § 116 et seq.

Am. Jur. Pleading and Practice Forms. — 1 Am. Jur. Pleading and Practice Forms, Abortion, § 2.

C.J.S. — 1 C.J.S., Abortion and Birth Control; Family Planning, § 1 et seq.

ALR. — Criminal responsibility of one

other than subject or actual perpetrator of abortion, 4 ALR 351.

Admissibility, in prosecution based on abortion, of evidence of commission of similar crimes by accused, 15 ALR2d 1080.

Woman upon whom abortion is committed or attempted as accomplice for pur-

poses of rule requiring corroboration of accomplice testimony, 34 ALR3d 858.

Right of action for injury to or death of woman who consented to illegal abortion, 36 ALR3d 630.

Homicide based on killing of unborn child, 40 ALR3d 444; 64 ALR5th 671.

Entrapment defense in sex offense prosecutions, 12 ALR4th 413.

Women's reproductive rights concerning abortion, and governmental regulation thereof — Supreme Court cases, 20 ALR Fed. 2d 1.

16-12-141. When abortion is legal; filing of certificate of abortion by performing physician.

(a) Nothing in this article shall be construed to prohibit an abortion performed by a physician duly licensed to practice medicine and surgery pursuant to Chapter 34 of Title 43, based upon his or her best clinical judgment that an abortion is necessary, except that Code Section 16-12-144 is a prohibition of a particular abortion method which shall apply to both duly licensed physicians and laypersons.

(b)(1) No abortion is authorized or shall be performed after the first trimester unless the abortion is performed in a licensed hospital, in a licensed ambulatory surgical center, or in a health facility licensed as an abortion facility by the Department of Community Health.

(2) An abortion shall only be performed by a physician licensed under Article 2 of Chapter 34 of Title 43.

(c) No abortion is authorized or shall be performed after the second trimester unless the physician and two consulting physicians certify that the abortion is necessary in their best clinical judgment to preserve the life or health of the woman. If the product of the abortion is capable of meaningful or sustained life, medical aid then available must be rendered.

(d) The performing physician shall file with the commissioner of public health within ten days after an abortion procedure is performed a certificate of abortion containing such statistical data as is determined by the Department of Public Health consistent with preserving the privacy of the woman. Hospital or other licensed health facility records shall be available to the district attorney of the judicial circuit in which the hospital or health facility is located. (Code 1933, § 26-1202, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1973, p. 635, § 1; Ga. L. 1997, p. 142, § 1; Ga. L. 2005, p. 1450, § 4/HB 197; Ga. L. 2009, p. 453, §§ 1-4, 1-6/HB 228; Ga. L. 2011, p. 705, §§ 6-3, 6-5/HB 214.)

The 2009 amendment, effective July 1, 2009, substituted “Department of Community Health” for “Department of Human Resources” at the end of paragraph (b)(1), and in the first sentence of subsec-

tion (d); and substituted “commissioner of community health” for “commissioner of human resources” in the first sentence of subsection (d).

The 2011 amendment, effective July

1, 2011, in the first sentence of subsection (d), substituted "commissioner of public health" for "commissioner of community health" and substituted "Department of Public Health" for "Department of Community Health".

Administrative rules and regulations. — Performance of abortions after the first trimester of pregnancy, Official Compilation of the Rules and Regulations

of the State of Georgia, Rules of Department of Human Resources, Chapter 290-5-32.

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Georgia St. U.L. Rev. 250 (1997). For article on 2005 amendment of this Code section, see 22 Georgia St. U.L. Rev. 147 (2005).

JUDICIAL DECISIONS

Whether an abortion is necessary is a professional judgment that a Georgia physician will be called upon to make routinely, and such words do not make O.C.G.A. § 16-12-141 unconstitutionally vague. *Doe v. Bolton*, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973).

Viable unborn child has right to protection. — Viable unborn child has the right under the United States Constitution to protection of state through statutes prohibiting arbitrary termination of life of an unborn fetus. *Jefferson v. Griffin*

Spalding County Hosp. Auth., 247 Ga. 86, 274 S.E.2d 457 (1981).

As to required acquiescence by co-practitioners under former Code 1933, § 26-1202(b)(3), the statute's connection, or lack thereof, with patient's needs and the statute's effect on physician's right to practice, see *Doe v. Bolton*, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973) (decided prior to repeal and reenactment of this section by Ga. L. 1973, p. 635, § 1) (see O.C.G.A. § 16-12-141(c)).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, §§ 26-1202 and 88-1716 are included in the annotations for this Code section.

Rights under section extend to female inmates in state prisons. — Beyond requirements provided by abortion statute enacted in compliance with holding of landmark, *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), and *Doe v. Bolton*, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973), the Board of Offender Rehabilitation may not regulate right of female inmates to have abortions; the board must comply with these statutory requirements in allowing and procuring abortions for female inmates, but a failure to permit such abortions under

prescribed conditions would lead to infringement of the female inmates' civil rights as guaranteed under the United States Constitution. 1977 Op. Att'y Gen. No. 77-36.

Certificate of legal abortion will not replace fetal death certificate (see §§ O.C.G.A. 31-10-18 and 31-10-19). 1973 Op. Att'y Gen. No. 73-71 (rendered under former Code 1933, §§ 26-1202 and 88-1716).

Physician is immune from civil liability for performing an abortion when requirements are met, assuming that no restraining order has been issued. 1970 Op. Att'y Gen. No. U70-61 (rendered under former Code 1933, § 26-1202, prior to repeal and reenactment by Ga. L. 1973, p. 635, § 1).

RESEARCH REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d, Abortion and Birth Control, § 3.

C.J.S. — 1 C.J.S., Abortion and Birth Control; Family Planning, § 1.

ALR. — Criminal responsibility of one other than subject or actual perpetrator of abortion, 4 ALR 351.

Right of action for injury to or death of woman who consented to illegal abortion, 36 ALR3d 630.

Homicide based on killing of unborn child, 40 ALR3d 444.

Woman's right to have abortion without consent of, or against objections of, child's father, 62 ALR3d 1097.

Entrapment defense in sex offense prosecutions, 12 ALR4th 413.

Medical practice in performance of legal abortion, 69 ALR4th 875.

16-12-141.1. Disposal of aborted fetuses; reporting requirements; penalties; public report; confidentiality of identity of physicians filing reports.

(a)(1) Every hospital and clinic in which abortions are performed or occur spontaneously, and any laboratory to which the aborted fetuses are delivered, shall provide for the disposal of the aborted fetuses by cremation, interment, or other manner approved of by the commissioner of public health. The hospital, clinic, or laboratory may complete any laboratory tests necessary for the health of the woman or her future offspring prior to disposing of the aborted fetus.

(2) Each hospital, clinic, and laboratory shall report, on a form of the type and confidentiality provided for in subsection (d) of Code Section 16-12-141, and provided by the commissioner of public health, the manner in which it disposes of the aborted fetus. Such reports shall be made annually by December 31 and whenever the method of disposal changes. The commissioner of public health shall provide forms for reporting under this Code section.

(b) Any hospital, clinic, or laboratory violating the provisions of subsection (a) of this Code section shall be punished by a fine of not less than \$1,000.00 nor more than \$5,000.00.

(c) Within 90 days after May 10, 2005, the Department of Human Resources (now known as the Department of Public Health for these purposes) shall prepare a reporting form for physicians which shall include:

(1) The number of females whose parent or guardian was provided the notice required in paragraph (1) of subsection (a) of Code Section 15-11-112 by the physician or such physician's agent; of that number, the number of notices provided personally under subparagraphs (a)(1)(A) and (a)(1)(B) of Code Section 15-11-112 and the number of notices provided by mail under subparagraph (a)(1)(C) of Code Section 15-11-112; and, of each of those numbers, the number of females who, to the best of the reporting physician's information and belief, went on to obtain the abortion;

(2) The number of females upon whom the physician performed an abortion without providing to the parent or guardian of a minor the

notice required by subsection (a) of Code Section 15-11-112; and of that number, the number of females for which subsection (b) of Code Section 15-11-112 and Code Section 15-11-116 were applicable;

(3) The number of abortions performed upon a female by the physician after receiving judicial authorization pursuant to subsection (b) of Code Section 15-11-112 and Code Section 15-11-114; and

(4) The same information described in paragraphs (1), (2), and (3) of this subsection with respect to females for whom a guardian or conservator has been appointed.

(d) The Department of Public Health shall ensure that copies of the reporting forms described in subsection (c) of this Code section, together with a reprint of this Code section, are provided:

(1) Within 120 days after May 10, 2005, to all health facilities licensed as an abortion facility by the Department of Human Resources (now known as the Department of Community Health for these purposes);

(2) To each physician licensed or who subsequently becomes licensed to practice medicine in this state at the same time as official notification to that physician that the physician is so licensed; and

(3) By December 1 of every year, other than the calendar year in which forms are distributed in accordance with paragraph (1) of this subsection, to all health facilities licensed as an abortion facility by the Department of Community Health.

(e) By February 28 of each year following a calendar year in any part of which this subsection was in effect, each physician who provided, or whose agent provided, the notice described in subsection (a) of Code Section 15-11-112 and any physician who knowingly performed an abortion upon a female or upon a female for whom a guardian or conservator had been appointed because of a finding of incompetency during the previous calendar year shall submit to the Department of Public Health a copy of the form described in subsection (c) of this Code section with the requested data entered accurately and completely.

(f) Reports that are submitted more than 30 days following the due date shall be subject to a late fee of \$500.00 for that period and the same fee for each additional 30 day period or portion of a 30 day period in which they remain overdue. Any physician required to report in accordance with this Code section who submits an incomplete report or fails to submit a report for more than one year following the due date may, in an action brought by the Department of Public Health, be directed by a court of competent jurisdiction to submit a complete report within a period stated by court order or be subject to sanctions for civil contempt.

(g) By June 30 of each year, the Department of Public Health shall issue a public report providing statistics for the previous calendar year compiled from all the reports covering that year submitted in accordance with this Code section for each of the items listed in subsection (c) of this Code section. The report shall also include statistics which shall be obtained by the Administrative Office of the Courts giving the total number of petitions or motions filed under subsection (b) of Code Section 15-11-112 and, of that number, the number in which the court appointed a guardian ad litem, the number in which the court appointed counsel, the number in which the judge issued an order authorizing an abortion without notification, the number in which the judge denied such an order, and, of the last, the number of denials from which an appeal was filed, the number of such appeals that resulted in the denials being affirmed, and the number of such appeals that resulted in reversals of such denials. Each report shall also provide the statistics for all previous calendar years for which such a public statistical report was required to be issued, adjusted to reflect any additional information from late or corrected reports. The Department of Public Health shall ensure that none of the information included in the public reports could reasonably lead to the identification of any individual female or of any female for whom a guardian or conservator has been appointed.

(h) The Department of Public Health may by regulation alter the dates established by paragraph (3) of subsection (d) and subsections (e) and (g) of this Code section or consolidate the forms or reports to achieve administrative convenience or fiscal savings or to reduce the burden of reporting requirements so long as reporting forms are sent to all facilities licensed as an abortion facility by the Department of Community Health at least once every year and the report described in subsection (g) of this Code section is issued at least once each year.

(i) The Department of Public Health shall ensure that the names and identities of the physicians filing reports under this Code section shall remain confidential. The names and identities of such physicians shall not be subject to Article 4 of Chapter 18 of Title 50. (Code 1981, § 16-12-141.1, enacted by Ga. L. 1985, p. 1421, § 1; Ga. L. 2005, p. 1450, § 5/HB 197; Ga. L. 2009, p. 453, § 1-6/HB 228; Ga. L. 2011, p. 705, §§ 6-3, 6-5/HB 214.)

The 2009 amendment, effective July 1, 2009, substituted “commissioner of community health” for “commissioner of human resources” in the first sentence of paragraph (a)(1), and in the first and last sentences of paragraph (a)(2).

The 2011 amendment, effective July 1, 2011, substituted “Department of Public Health” for “Department of Community

Health” throughout this Code section, and substituted “commissioner of public health” for “commissioner of community health” in the first sentence of paragraph (a)(1), and in the first and last sentences of paragraph (a)(2).

Cross references. — Reporting induced termination of pregnancy, § 31-10-19. Reporting of fetal deaths for

vital records purposes, § 31-10-29. Dead bodies generally, T. 31, C. 21.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1986, in the first sentence of paragraph (a)(2), commas were added following “shall report,” “16-12-141,” and “human resources” (now community health).

Pursuant to Code Section 28-9-5, in 2005, “May 10, 2005” was substituted for “the effective date of this subsection” in subsection (c) and in paragraph (d)(1).

Pursuant to Code Section 28-9-5, in 2009, “Community Health” was substituted for “Human Resources” throughout

this Code section and “(now known as the Department of Community Health for these purposes)” was inserted in the introductory language of subsection (c) and in paragraph (d)(1).

Administrative rules and regulations. — Reporting requirement for all abortions, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Department of Human Resources, Chapter 290-5-32.

Law reviews. — For article on 2005 amendment of this Code section, see 22 Georgia St. U.L. Rev. 147 (2005).

16-12-142. Objections by medical facilities, physicians, or pharmacists to providing abortion-related services.

(a) Nothing in this article shall require a hospital or other medical facility or physician to admit any patient under the provisions of this article for the purpose of performing an abortion. In addition, any person who states in writing an objection to any abortion or all abortions on moral or religious grounds shall not be required to participate in procedures which will result in such abortion; and the refusal of the person to participate therein shall not form the basis of any claim for damages on account of such refusal or for any disciplinary or recriminatory action against the person. The written objection shall remain in effect until the person revokes it or terminates his association with the facility with which it is filed.

(b) Any pharmacist who states in writing an objection to any abortion or all abortions on moral or religious grounds shall not be required to fill a prescription for a drug which purpose is to terminate a pregnancy; and the refusal of the person to fill such prescription shall not form the basis of any claim for damages on account of such refusal or for any disciplinary or recriminatory action against the person; provided, however, that the pharmacist shall make all reasonable efforts to locate another pharmacist who is willing to fill such prescription or shall immediately return the prescription to the prescription holder. The written objection shall remain in effect until the person revokes it or terminates his or her association with the facility with which it is filed. Nothing in this subsection shall be construed to authorize a pharmacist to refuse to fill a prescription for birth control medication, including any process, device, or method to prevent pregnancy and including any drug or device approved by the federal Food and Drug Administration for such purpose. (Code 1933, § 26-1202, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1973, p. 635, § 1; Ga. L. 2006, p. 152, § 2A/HB 1178.)

Law reviews. — For article on 2006 amendment of this Code section, see 23 Georgia St. U.L. Rev. 197 (2006).

16-12-143. Failure to file or maintain required written reports.

A person who fails to file or maintain in complete form any of the written reports required in this article within the time set forth is guilty of a misdemeanor. (Code 1933, § 26-1203, enacted by Ga. L. 1973, p. 635, § 1.)

16-12-144. Partial-birth abortions.

(a) As used in this Code section, the term:

(1) “Fetus” means the biological offspring of human parents.

(2) “Partial-birth abortion” means an abortion in which the person performing the abortion partially vaginally delivers a living human fetus before ending the life of the fetus and completing the delivery.

(b) Any person who knowingly performs a partial-birth abortion and thereby ends the life of a human fetus shall, upon conviction thereof, be punished by a fine not to exceed \$5,000.00, imprisonment for not more than five years, or both. This prohibition shall not apply to a partial-birth abortion that is necessary to save the life of the mother because her life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering condition caused by or arising from the pregnancy itself, provided that no other medical procedure will suffice to save the mother’s life.

(c)(1) The father of the fetus, and the maternal grandparents of the fetus if the mother has not attained the age of 18 years of age at the time of the abortion, may obtain appropriate relief in a civil action, unless the pregnancy resulted from the plaintiff’s criminal conduct or the plaintiff consented to the abortion.

(2) Such relief shall include:

(A) Money damages for all injuries, psychological and physical, occasioned by the violation of this Code section; and

(B) Statutory damages equal to three times the cost of the partial-birth abortion.

(d) A woman upon whom a partial-birth abortion is performed may not be prosecuted under this Code section for violating this Code section or any provision thereof, or for conspiracy or for an attempt to violate this Code section or any provision thereof. (Code 1981, § 16-12-144, enacted by Ga. L. 1997, p. 142, § 2.)

Cross references. — Provision that enumeration of rights shall not exclude other inherent rights, Ga. Const. 1983, Art. I, Sec. I, Para. XXIX.

Law reviews. — For article commenting on the enactment of this Code section, see 14 Georgia St. U.L. Rev. 250 (1997).

JUDICIAL DECISIONS

Court approved parties' consent decree stipulation in plaintiff's action which challenged constitutionality of O.C.G.A. § 16-12-144, which stipulation provided that statute would be enforced only as to abortions performed after the point of viability; that the term "living

human fetus" as used in that statute meant "viable human fetus"; and that the statute applied only to abortions in which an "intact dilation and extraction" abortion procedure was used. *Midtown Hosp. v. Miller*, 36 F. Supp. 2d 1360 (N.D. Ga. 1998).

RESEARCH REFERENCES

ALR. — Validity, construction, and application of statutory restrictions on partial birth abortions, 76 ALR5th 637.

ARTICLE 6

HUMAN BODY TRAFFIC

16-12-160. Buying or selling or offering to buy or sell the human body or parts.

(a) It shall be unlawful, except as provided in subsection (b) of this Code section, for any person, firm, or corporation to buy or sell, to offer to buy or sell, or to assist another in buying or selling or offering to buy or sell a human body or any part of a human body or buy or sell a human fetus or any part thereof.

(b) The prohibition contained in subsection (a) of this Code section shall not apply to:

(1) The purchase or sale of whole blood, blood plasma, blood products, blood derivatives, other self-replicating body fluids, or hair;

(2) A gift or donation of a human body or any part of a human body or any procedure connected therewith as provided in Article 6 of Chapter 5 of Title 44 or to the payment of a fee in connection with such gift or donation pursuant to subsection (b) of Code Section 44-5-154 if such fee is paid to a procurement organization, as that term is defined in Code Section 44-5-141;

(3) The reimbursement of actual expenses, including medical costs, lost income, and travel expenses, incurred by a living person in giving or donating a part of the person's body;

(4) The payment of financial assistance under a plan of insurance or other health care coverage;

(5) The purchase or sale of human tissue, organs, or other parts of the human body for health sciences education; or

(6) The payment of reasonable costs associated with the removal, storage, or transportation of a human body or any part of a human body given or donated for medical or scientific purposes.

(c) Any person, firm, or corporation convicted of violating subsection (a) of this Code section shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine not exceeding \$5,000.00 or by imprisonment for not less than one year nor more than five years, or both. (Code 1981, § 16-12-160, enacted by Ga. L. 1986, p. 645, § 4; Ga. L. 1989, p. 456, § 1; Ga. L. 1992, p. 2946, § 1; Ga. L. 2008, p. 503, § 2/SB 405.)

Cross references. — Anatomical gifts, amendment to this Code section, see 6 § 44-5-140 et seq. Georgia St. U.L. Rev. 201 (1989).

Law reviews. — For note on 1989

RESEARCH REFERENCES

ALR. — Physician's use of patient's medical research or economic purposes, 16 tissues, cells, or bodily substances for ALR5th 143.

16-12-161. Removal of body parts from scene of death or dismemberment; criminal penalty.

(a) It shall be unlawful for any person to remove from the scene of the death or dismemberment of any person any human body part; provided, however, that this Code section shall not apply to a law enforcement officer acting in the lawful discharge of his or her official duties, or to any person acting under the direction of a law enforcement officer, a physician or an emergency medical technician in the course of their professions, or in the absence of any such person to any person who transports such body part directly to a medical facility, law enforcement agency, or licensed funeral home, although all such persons remain obligated to comply with the provisions of Article 2 of Chapter 16 of Title 45 concerning death investigations.

(b) Any person violating the provisions of subsection (a) of this Code section shall be guilty of a misdemeanor of a high and aggravated nature. (Code 1981, § 16-12-161, enacted by Ga. L. 1994, p. 334, § 1.)

ARTICLE 7

SALE OR DISTRIBUTION TO, OR POSSESSION BY, MINORS OF CIGARETTES AND TOBACCO RELATED OBJECTS

Cross references. — Master settlement agreement, § 10-13-1 et seq.

16-12-170. Definitions.

As used in this article, the term:

(1) "Cigarettes" means any type of tobacco or tobacco product.

(2) "Community service" means a public service which a minor might appropriately be required to perform, as determined by the court, as punishment for certain offenses provided for in this article.

(3) "Minor" means any person who is under the age of 18 years.

(4) "Person" means any natural person or any firm, partnership, company, corporation, or other entity.

(5) "Proper identification" means any document issued by a governmental agency containing a description of the person, such person's photograph, or both, and giving such person's date of birth and includes, without being limited to, a passport, military identification card, driver's license, or an identification card authorized under Code Sections 40-5-100 through 40-5-104. "Proper identification" shall not include a birth certificate.

(6) "Tobacco related objects" means any papers, wrappers, or other products, devices, or substances which are used for the purpose of making cigarettes or tobacco in any form whatsoever. (Code 1981, § 16-12-170, enacted by Ga. L. 1987, p. 945, § 1; Ga. L. 1989, p. 14, § 16; Ga. L. 1993, p. 343, § 1.)

16-12-171. Prohibited acts.

(a)(1) It shall be unlawful for any person knowingly to:

(A) Sell or barter, directly or indirectly, any cigarettes or tobacco related objects to a minor;

(B) Purchase any cigarettes or tobacco related objects for any minor unless the minor for whom the purchase is made is the child of the purchaser; or

(C) Advise, counsel, or compel any minor to smoke, inhale, chew, or use cigarettes or tobacco related objects.

(2)(A) The prohibition contained in paragraph (1) of this subsection shall not apply with respect to sale of cigarettes, tobacco products, or tobacco related objects by a person when such person has been furnished with proper identification showing that the person to whom the cigarettes, tobacco products, or tobacco related objects are sold is 18 years of age or older.

(B) In any case where a reasonable or prudent person could reasonably be in doubt as to whether or not the person to whom

cigarettes or tobacco related objects are to be sold or otherwise furnished is actually 18 years of age or older, it shall be the duty of the person selling or otherwise furnishing such cigarettes or tobacco related objects to request to see and to be furnished with proper identification as provided for in subsection (b) of this Code section in order to verify the age of such person. The failure to make such request and verification in any case where the person to whom the cigarettes or tobacco related objects are sold or otherwise furnished is less than 18 years of age may be considered by the trier of fact in determining whether the person selling or otherwise furnishing such cigarettes or tobacco related objects did so knowingly.

(3) Any person who violates this subsection shall be guilty of a misdemeanor.

(b)(1) It shall be unlawful for any minor to:

(A) Purchase, attempt to purchase, or possess for personal use any cigarettes or tobacco related objects. This subparagraph shall not apply to possession of cigarettes or tobacco related objects by a minor when a parent or guardian of such minor gives the cigarettes or tobacco related objects to the minor and possession is in the home of the parent or guardian and such parent or guardian is present; or

(B) Misrepresent such minor's identity or age or use any false identification for the purpose of purchasing or procuring any cigarettes or tobacco related objects.

(2) A minor who commits an offense provided for in paragraph (1) of this subsection may be punished as follows:

(A) By requiring the performance of community service not exceeding 20 hours;

(B) By requiring attendance at a publicly or privately sponsored lecture or discussion on the health hazards of smoking or tobacco use, provided such lecture or discussion is offered without charge to the minor; or

(C) By a combination of the punishments described in subparagraphs (A) and (B) of this paragraph. (Code 1981, § 16-12-171, enacted by Ga. L. 1987, p. 945, § 1; Ga. L. 1993, p. 343, § 2; Ga. L. 1996, p. 483, § 1; Ga. L. 1999, p. 81, § 16; Ga. L. 2004, p. 332, § 1; Ga. L. 2007, p. 497, § 1/SB 95.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1987, "subparagraphs (A) and (B)" was substituted for

"subparagraphs (A), (B), and (C)" in subparagraph (b)(2)(C).

Law reviews. — For review of 1996

offenses against public health and morals legislation, see 13 Georgia. St. U.L. Rev. 121 (1996).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprintable offenses. — products by minors, are not at this time designated as offenses which require fingerprinting. 1987 Op. Att'y Gen. No. 87-21.

O.C.G.A. § 16-12-171 prohibiting the sale of cigarettes or other tobacco products to minors, and the possession of tobacco

16-12-172. Posting signs in place of business.

(a) Any person owning or operating a place of business in which cigarettes, tobacco products, or tobacco related objects are sold or offered for sale shall post in a conspicuous place a sign which shall contain the following statement:

“SALE OF CIGARETTES, TOBACCO, TOBACCO PRODUCTS, OR TOBACCO RELATED OBJECTS TO PERSONS UNDER 18 YEARS OF AGE IS PROHIBITED BY LAW.”

Such sign shall be printed in letters of at least one-half inch in height.

(b) Any person who fails to comply with the requirements of subsection (a) of this Code section shall be guilty of a misdemeanor. (Code 1981, § 16-12-172, enacted by Ga. L. 1987, p. 945, § 1; Ga. L. 1993, p. 343, § 3.)

16-12-173. Sales from vending machines.

(a)(1) Any person who maintains in such person's place of business a vending machine which dispenses cigarettes, tobacco products, or tobacco related objects shall place or cause to be placed in a conspicuous place on such vending machine a sign containing the following statement:

“THE PURCHASE OF CIGARETTES, TOBACCO PRODUCTS, OR TOBACCO RELATED OBJECTS FROM THIS VENDING MACHINE BY ANY PERSON UNDER 18 YEARS OF AGE IS PROHIBITED BY LAW.”

(2) Any person who maintains in such person's place of business a vending machine which dispenses cigarettes, tobacco products, or tobacco related objects shall not dispense any nontobacco product, other than matches, in such vending machine.

(b) Any person who fails to comply with the requirements of subsection (a) of this Code section shall be guilty of a misdemeanor; provided, however, for a first offense, the sentence shall be a fine not to exceed \$300.00.

(c) It shall be a violation of subsection (a) of Code Section 16-12-171 for any person knowingly to allow a minor to operate a vending machine which dispenses cigarettes or tobacco related objects.

(d) The offenses provided for by paragraph (1) of subsection (b) of Code Section 16-12-171 shall apply to the operation by a minor of a vending machine which dispenses cigarettes or tobacco related objects.

(e)(1) The sale or offering for sale of cigarettes or tobacco related objects from vending machines shall not be permitted except:

(A) In locations which are not readily accessible to minors, including but not limited to:

(i) Factories, businesses, offices, and other places which are not open to the general public;

(ii) Places open to the general public which do not admit minors; and

(iii) Places where alcoholic beverages are offered for sale;

(B) In areas which are in the immediate vicinity, plain view, and under the continuous supervision of the proprietor of the establishment or an employee who will observe the purchase of cigarettes, tobacco products, and tobacco related objects from the vending machine; and

(C) In rest areas adjacent to roads and highways of the state.

(2) Violation of this subsection shall be punished as provided in subsection (b) of this Code section for violation of subsection (a) of this Code section. (Code 1981, § 16-12-173, enacted by Ga. L. 1987, p. 945, § 1; Ga. L. 1993, p. 343, § 4; Ga. L. 2007, p. 497, § 2/SB 95.)

16-12-174. Distribution of tobacco product samples.

(a) As used in this Code section, the term “tobacco product sample” means a tobacco product distributed to members of the general public at no cost for purposes of promoting the product.

(b) It shall be unlawful for any person to distribute any tobacco product sample to any person under the age of 18 years.

(c) A person distributing tobacco product samples shall require proof of age from a prospective recipient if an ordinary person would conclude on the basis of appearance that such prospective recipient may be under the age of 18 years.

(d) It shall be unlawful for any person who has not attained the age of 18 years to receive or attempt to receive any tobacco product sample.

(e) No person shall distribute tobacco product samples on any public street, sidewalk, or park within 500 feet of any school or playground when those facilities are being used primarily by persons under the age of 18 years.

(f) Violation of this Code section shall be punished as a misdemeanor. (Code 1981, § 16-12-174, enacted by Ga. L. 1993, p. 343, § 5.)

16-12-175. Enforcement actions; collection and report of fines; inspections by law enforcement agencies; annual report.

(a) The provisions of this article, inclusive, shall be enforced through actions brought in any court of competent jurisdiction by the prosecuting attorney for the county in which the alleged violation occurred as well as through administrative citations issued by special agents or enforcement officers of the state revenue commissioner. Any fine collected for a violation of said provision shall be paid to the clerk of the court of the jurisdiction in which the violation occurred. Upon receipt of a fine for any violation of said provision, the clerk shall promptly notify the state revenue commissioner of the violation.

(b) The state revenue commissioner, acting through special agents or enforcement officers, shall annually conduct random, unannounced inspections at locations where tobacco products are sold or distributed to ensure compliance with this article. Persons under the age of 18 years may be enlisted to test compliance with this article; provided, however, that such persons may be used to test compliance with this article only if the testing is conducted under the direct supervision of such special agents or enforcement officers and written parental consent has been provided. Any other use of persons under the age of 18 years to test compliance with this article or any other prohibition of like or similar import shall be unlawful and the person or persons responsible for such use shall be subject to the penalties prescribed in this article. The state revenue commissioner shall prepare annually for submission by the Governor to the secretary of the United States Department of Health and Human Services the report required by section 1926 of subpart I of part B of Title XIX of the federal Public Health Service Act, 42 U.S.C. 300x-26. (Code 1981, § 16-12-175, enacted by Ga. L. 1993, p. 343, § 5; Ga. L. 2000, p. 1343, § 1; Ga. L. 2011, p. 752, § 16/HB 142.)

The 2011 amendment, effective May 13, 2011, part of an Act to revise, modernize, and correct the Code, revised punctuation in the second sentence of subsection (b).

Editor's notes. — Ga. L. 2011, p. 752,

§ 16(7), which amended this Code section, purported to amend Code Section 6-12-175 but actually amended Code Section 16-12-175.

Law reviews. — For review of 1996 offenses against public health and morals

legislation providing for stricter regula- tobacco-related objects to minors, see 13
tions on the sale of cigarettes and Georgia St. U.L. Rev. 121 (1996).

16-12-176. Administration and enforcement.

The state revenue commissioner shall administer and enforce this article and may make reasonable rules and regulations for its administration and enforcement. The state revenue commissioner may designate employees of the Department of Revenue for the purpose of administering and enforcing this article and may delegate to employees of such department any of the duties required of the state revenue commissioner pursuant to this article. (Code 1981, § 16-12-176, enacted by Ga. L. 2000, p. 1343, § 1.)

CHAPTER 13

CONTROLLED SUBSTANCES

Article 1		Sec.	
General Provisions			
Sec.			
16-13-1.	Drug related objects.	16-13-30.2.	Unlawful manufacture, distribution, or possession with intent to distribute of imitation controlled substances.
16-13-2.	Conditional discharge for possession of controlled substances as first offense and certain nonviolent property crimes; dismissal of charges; restitution to victims.	16-13-30.3.	Possession of substances containing ephedrine, pseudoephedrine, and phenylpropanolamine; restrictions on sales of products containing pseudoephedrine.
16-13-3.	Penalty for abandonment of dangerous drugs, poisons, or controlled substances.	16-13-30.4.	Licenses for sale, transfer, or purchase for resale of products containing pseudoephedrine; reporting and record-keeping requirements; grounds for denial, suspension, or revocation of licenses; rules and regulations; exceptions; forfeiture; violations.
16-13-4.	Approval by Food and Drug Administration as prerequisite to sale of controlled substances and dangerous drugs.	16-13-30.5.	Possession of substances with intent to use or convey such substances for the manufacture of Schedule I or Schedule II controlled substances.
Article 2		16-13-30.6.	Prohibition on purchase and sale of marijuana flavored products.
Regulation of Controlled Substances		16-13-31.	Trafficking in cocaine, illegal drugs, marijuana, or methamphetamine; penalties.
PART 1		16-13-31.1.	Trafficking in ecstasy; penalties.
SCHEDULES, OFFENSES, AND PENALTIES		16-13-32.	Transactions in drug related objects; forfeitures and penalties.
16-13-20.	Short title.	16-13-32.1.	Transactions in drug related objects; evidence as to whether object is drug related; forfeitures and penalties.
16-13-21.	Definitions.	16-13-32.2.	Possession and use of drug related objects.
16-13-22.	Administration of article; standards and schedules.	16-13-32.3.	Use of communication facility in committing or facilitating commission of act which constitutes felony under chapter; penalty.
16-13-23.	Nomenclature for controlled substances.		
16-13-24.	Establishment of schedules of controlled substances.		
16-13-25.	Schedule I.		
16-13-26.	Schedule II.		
16-13-27.	Schedule III.		
16-13-27.1.	Exempt anabolic steroids.		
16-13-28.	Schedule IV.		
16-13-29.	Schedule V.		
16-13-29.1.	Nonnarcotic substances excluded from schedules of controlled substances.		
16-13-29.2.	Authority for exemption of over-the-counter Schedule V controlled substances.		
16-13-30.	Purchase, possession, manufacture, distribution, or sale of controlled substances or marijuana; penalties.		
16-13-30.1.	Unlawful manufacture, deliv-		

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| Sec. | Sec. |
| 16-13-32.4. Manufacturing, distributing, dispensing, or possessing controlled substances in, on, or near public or private schools. | 16-13-45. Powers of enforcement personnel. |
| 16-13-32.5. Manufacturing, distributing, dispensing, or possessing controlled substance, marijuana, or counterfeit substance near park or housing project; nonmerger of offenses; evidence of location and boundaries; posting; affirmative defenses. | 16-13-46. Administrative inspections and warrants. |
| 16-13-32.6. Manufacturing, distributing, dispensing, or possessing with intent to distribute controlled substance or marijuana in, on, or within drug-free commercial zone. | 16-13-47. Injunctions. |
| 16-13-33. Attempt or conspiracy to commit offense under this article. | 16-13-48. Cooperative arrangements with federal and other state agencies. |
| 16-13-34. Promulgation of rules relating to registration and control of controlled substances; registration fees. | 16-13-48.1. Funds or property transferred to state or local agencies under federal drug laws. |
| 16-13-35. General registration requirements. | 16-13-49. Forfeitures. |
| 16-13-36. Factors considered in determining whether to register manufacturer or distributor. | 16-13-50. Burden of proof; liability of enforcement officers in lawful performance of duties. |
| 16-13-37. Grounds for suspending or revoking registration; disposition of controlled substances; notification to bureau. | 16-13-51. Judicial review of administrative determinations, findings, and conclusions. |
| 16-13-38. Procedure for denying, suspending, revoking, or limiting registration; automatic suspension. | 16-13-52. Programs and research on prevention of abuse of controlled substances; confidentiality of research; exemption from penalties. |
| 16-13-39. Manufacturers, distributors, and dispensers to maintain records of controlled substances. | 16-13-53. Pending proceedings. |
| 16-13-40. Distribution of Schedule I and II substances. | 16-13-54. Orders and rules promulgated prior to July 1, 1974. |
| 16-13-41. Prescriptions. | 16-13-55. Construction of article. |
| 16-13-42. Unauthorized distribution and dispensation; refusal or failure to keep records; refusal to permit inspection; unlawfully maintaining structure or place; penalty. | 16-13-56. Penalty for violation of article; restitution to the state for cleanup of environmental hazards; other remedies. |
| 16-13-43. Unauthorized distribution; penalties. | |
| 16-13-44. Penalties under other laws. | |

PART 2

ELECTRONIC DATA BASE OF PRESCRIPTION INFORMATION

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| 16-13-57. Program to record prescription information into electronic database; administration and oversight. |
| 16-13-58. Funds for development and maintenance of program; granting of funds to dispensers. |
| 16-13-59. Information to include for each Schedule II, III, IV, or V controlled substance prescription; compliance. |
| 16-13-60. Privacy and confidentiality; use of data; security program. |
| 16-13-61. Electronic Database Review Advisory Committee; members; terms; officers; procedure; compensation. |

- Sec.
 16-13-62. Rules and regulations.
 16-13-63. Liability.
 16-13-64. Violations; criminal penalties;
 civil damages.
 16-13-65. Exceptions.

Article 3

Dangerous Drugs

- 16-13-70. Short title.
 16-13-70.1. Definition of terms.
 16-13-71. "Dangerous drug" defined.
 16-13-71.1. "Anabolic steroid" defined
 [Repealed].
 16-13-72. Sale, distribution, or posses-
 sion of dangerous drugs.
 16-13-72.1. Revocation of dangerous drug
 permit; forfeiture.
 16-13-73. Labeling prescription con-
 tainers of dangerous drugs.
 16-13-74. Written prescriptions for dan-
 gerous drugs; content; signa-
 ture.
 16-13-75. Drugs to be kept in original
 container; exception.
 16-13-76. Use of fictitious name or false
 address when obtaining
 drugs.
 16-13-77. Applicability of article to
 practitioner of the healing
 arts.
 16-13-78. Obtaining or attempting to
 obtain dangerous drugs by
 fraud, forgery, or concealment
 of material fact.
 16-13-78.1. Prescribing or ordering dan-
 gerous drugs.
 16-13-78.2. Possession, manufacture, de-
 livery, distribution, or sale of
 counterfeit substances.

- Sec.
 16-13-79. Violations.

Article 4

**Sale, Possession, Transfer, or
 Inhalation of Model Glue**

- 16-13-90. "Model glue" defined.
 16-13-91. Intentional inhalation of
 model glue; application of ar-
 ticle to anesthesia.
 16-13-92. Possession, sale, or transfer of
 model glue.
 16-13-93. Sale or transfer of model glue
 to minors.
 16-13-94. Maintenance of records of
 sales to minors.
 16-13-95. Effect of article on laws or
 ordinances of counties and
 municipalities.
 16-13-96. Penalty for violation of arti-
 cle; separate offenses.

Article 5

**Sanctions Against Licensed Persons
 for Offenses Involving Controlled
 Substances or Marijuana**

- 16-13-110. Definitions.
 16-13-111. Notification of conviction of li-
 censed individual to licensing
 authority; reinstatement of li-
 cense; imposition of more
 stringent sanctions.
 16-13-112. Applicability of administra-
 tive procedures.
 16-13-113. Article as supplement to
 power of licensing authority.
 16-13-114. Period of applicability of arti-
 cle.

Cross references. — Requirement that certain wholesale distributors of controlled substances and dangerous drugs provide price and quantity information, § 26-4-115.1. Authority of director of investigation to retain narcotics agents on contractual basis, § 35-3-9. Suspension or termination of public employee convicted of drug offense, § 45-23-4. Ineligibility for public employment of person convicted of drug offense, § 45-23-5.

Editor's notes. — By resolution (Ga. L. 1983, p. 590), the General Assembly directed the Composite State Board of Medical Examiners to develop and adopt rules and regulations to curb the abuse of prescription amphetamine and amphetamine-like drugs for the treatment of obesity and other nonrelated acceptable medical treatments.

By resolution (Ga. L. 1990, p. 985), the General Assembly created the Joint Steer-

ing Committee for the Georgia General Assembly's Conference on Children of Cocaine and Substance Abuse.

Administrative rules and regulations. — Drug abuse treatment and education programs, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Department of Human Resources, Chapter 290-4-2.

Law reviews. — For article, "A Report from the Front in the War on Drugs," see 7 Georgia St. U.L. Rev. 1 (1990).

For comment, "Solving the Problem of Prenatal Substance Abuse: An Analysis of Punitive and Rehabilitative Approaches," see 39 Emory L.J. 1401 (1990).

JUDICIAL DECISIONS

Evidence was insufficient to support conviction of possessing cocaine. — When (1) defendant's only connection to cocaine that was found in a jacket was that the defendant picked up the jacket after the jacket had been lying outside on an air conditioner in close proximity to a juvenile who was suspected in drug transactions and an unidentified woman, and (2) there was no evidence as to who placed the jacket on the air conditioner, the evidence against the defendant was entirely circumstantial and did not exclude every other hypothesis except guilt; therefore, the evidence was insufficient under O.C.G.A. § 24-4-6 to support the defendant's conviction of possessing

cocaine in violation of the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq. *Stephens v. State*, 258 Ga. App. 774, 575 S.E.2d 661 (2002).

Cited in *Ward v. State*, 248 Ga. 60, 281 S.E.2d 503 (1981); *Ward v. State*, 165 Ga. App. 166, 300 S.E.2d 193 (1983); *Meade v. State*, 165 Ga. App. 556, 301 S.E.2d 912 (1983); *Spivey v. State*, 165 Ga. App. 820, 302 S.E.2d 729 (1983); *Murrell v. State*, 166 Ga. App. 526, 304 S.E.2d 408 (1983); *Luck v. State*, 168 Ga. App. 464, 309 S.E.2d 621 (1983); *Causey v. State*, 195 Ga. App. 367, 393 S.E.2d 468 (1990); *DeLoach v. State*, 198 Ga. App. 880, 403 S.E.2d 866 (1991).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Entrapment to Commit Narcotics Offense, 12 POF2d 237.

Injuries from Drugs, 7 POF3d 1.

Am. Jur. Trials. — Defense of Narcotics Cases, 8 Am. Jur. Trials 573.

ALR. — Defense of necessity, duress, or

coercion in prosecution for violation of state narcotics laws, 1 ALR5th 938.

Illegal drugs or narcotics involved in alleged offense as subject to discovery by defendant under Rule 16 of Federal Rules of Criminal Procedure, 109 ALR Fed. 363.

ARTICLE 1

GENERAL PROVISIONS

16-13-1. Drug related objects.

(a) As used in this Code section, the term:

(1) "Controlled substance" shall have the same meaning as defined in Article 2 of this chapter, relating to controlled substances. For the purposes of this Code section, the term "controlled substance" shall include marijuana as defined by paragraph (16) of Code Section 16-13-21.

(2) "Dangerous drug" shall have the same meaning as defined in Article 3 of this chapter, relating to dangerous drugs.

(3) "Drug related object" means any machine, instrument, tool, equipment, contrivance, or device which an average person would reasonably conclude is intended to be used for one or more of the following purposes:

(A) To introduce into the human body any dangerous drug or controlled substance under circumstances in violation of the laws of this state;

(B) To enhance the effect on the human body of any dangerous drug or controlled substance under circumstances in violation of the laws of this state;

(C) To conceal any quantity of any dangerous drug or controlled substance under circumstances in violation of the laws of this state; or

(D) To test the strength, effectiveness, or purity of any dangerous drug or controlled substance under circumstances in violation of the laws of this state.

(4) "Knowingly" means having general knowledge that a machine, instrument, tool, item of equipment, contrivance, or device is a drug related object or having reasonable grounds to believe that any such object is or may, to an average person, appear to be a drug related object. If any such object has printed thereon or is accompanied by instructions explaining the purpose and use of such object and if following such instructions would cause a person to commit an act involving the use or possession of a dangerous drug or controlled substance in violation of the laws of this state, then such instructions shall constitute prima-facie evidence of knowledge that the object in question is a drug related object.

(5) "Minor" means any unmarried person under the age of 18 years.

(b) Except as otherwise provided by subsection (d) of this Code section, it shall be unlawful for any person knowingly to sell, deliver, distribute, display for sale, or provide to a minor or knowingly possess with intent to sell, deliver, distribute, display for sale, or provide to a minor any drug related object.

(c) It shall be unlawful for any minor falsely to represent to any person that such minor is 18 years of age or older with the intent to purchase or otherwise obtain any drug related object.

(d) No person shall be guilty of violating subsection (b) of this Code section if:

(1) The person had reasonable cause to believe that the minor involved was 18 years of age or older because the minor exhibited to such person a driver's license, birth certificate, or other official or apparently official document purporting to establish that the minor was 18 years of age or older;

(2) The person made an honest mistake in believing that the minor was 18 years of age or over after making a reasonable bona fide attempt to ascertain the true age of the minor;

(3) The person was the parent or guardian of the minor; or

(4) The person was acting in his capacity as an employee or official of any governmental agency, governmental institution, public school or other public educational institution, any bona fide private school, educational institution, health care facility, or institution; or the person was acting in his capacity as a registered pharmacist or veterinarian or under the direction of a registered pharmacist or veterinarian to sell such object for a legitimate medical purpose.

(e) Any person who violates subsection (b) of this Code section shall be guilty of a misdemeanor for the first offense. For the second or any subsequent offense, a person violating subsection (b) of this Code section shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years or by a fine of not less than \$1,000.00 nor more than \$5,000.00, or both. Any person violating subsection (c) of this Code section shall be guilty of a misdemeanor. (Code 1933, § 26-9913, enacted by Ga. L. 1978, p. 2199, § 1; Ga. L. 1985, p. 149, § 16; Ga. L. 1999, p. 81, § 16.)

JUDICIAL DECISIONS

Constitutionality. — Definition of “drug related objects” in O.C.G.A. § 16-13-1 provides adequate notice of the persons covered and conduct proscribed and is not therefore void for vagueness. *High Ol' Times, Inc. v. Busbee*, 673 F.2d 1225 (11th Cir. 1982).

Jury instructions. — Court's refusal to give charge to jury that defendant's explanation was to be taken into consideration insofar as it was consistent with properly admitted circumstantial evidence was not error where instruction was given to the jury regarding presumption of defendant's innocence and regarding the state's burden of proof to prove defendant guilty beyond a reasonable doubt. *Upshaw v. State*, 172 Ga. App. 671, 324 S.E.2d 529 (1984).

Civil action to recover for injuries

after consuming controlled substance. — Consumer of controlled substances may not recover damages for injuries sustained in an automobile accident after taking the drugs, when the provider had taken the drugs from the pharmacy in which the provider worked, and the consumer should have foreseen the possibility of an accident after using drugs. *Guy v. McKenzie*, 195 Ga. App. 670, 394 S.E.2d 576 (1990).

Cited in *High Ol' Times, Inc. v. Busbee*, 449 F. Supp. 364 (N.D. Ga. 1978); *High Ol' Times, Inc. v. Busbee*, 456 F. Supp. 1035 (N.D. Ga. 1978); *High Ol' Times, Inc. v. Busbee*, 621 F.2d 135 (5th Cir. 1980); *Hill v. Morrison*, 160 Ga. App. 151, 286 S.E.2d 467 (1981); *Gunn v. State*, 163 Ga. App. 906, 296 S.E.2d 221 (1982); *Todd v. Byrd*, 283 Ga. App. 37, 640 S.E.2d 652 (2006).

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Drugs and Controlled Substances, §§ 19 et seq., 47 et seq. 32 Am. Jur. 2d, False Pretenses, § 7.

U.L.A. — Uniform Controlled Substances Act (U.L.A.) § 101 et seq.

ALR. — Prosecutions based upon alleged illegal possession of instruments to

be used in violation of narcotics laws, 92 ALR3d 47.

Propriety of instruction of jury on "conscious avoidance" of knowledge of nature of substance or transaction in prosecution for possession or distribution of drugs, 109 ALR Fed. 710.

16-13-2. Conditional discharge for possession of controlled substances as first offense and certain nonviolent property crimes; dismissal of charges; restitution to victims.

(a) Whenever any person who has not previously been convicted of any offense under Article 2 or Article 3 of this chapter or of any statute of the United States or of any state relating to narcotic drugs, marijuana, or stimulant, depressant, or hallucinogenic drugs, pleads guilty to or is found guilty of possession of a narcotic drug, marijuana, or stimulant, depressant, or hallucinogenic drug, the court may without entering a judgment of guilt and with the consent of such person defer further proceedings and place him on probation upon such reasonable terms and conditions as the court may require, preferably terms which require the person to undergo a comprehensive rehabilitation program, including, if necessary, medical treatment, not to exceed three years, designed to acquaint him with the ill effects of drug abuse and to provide him with knowledge of the gains and benefits which can be achieved by being a good member of society. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed accordingly. Upon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against him. Discharge and dismissal under this Code section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of this Code section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime. Discharge and dismissal under this Code section may occur only once with respect to any person.

(b) Notwithstanding any law to the contrary, any person who is charged with possession of marijuana, which possession is of one ounce or less, shall be guilty of a misdemeanor and punished by imprisonment for a period not to exceed 12 months or a fine not to exceed \$1,000.00, or both, or public works not to exceed 12 months.

(c) Persons charged with an offense enumerated in subsection (a) of this Code section and persons charged for the first time with nonviolent property crimes which, in the judgment of the court exercising jurisdiction over such offenses, were related to the accused's addiction to a controlled substance or alcohol who are eligible for any court approved

drug treatment program may, in the discretion of the court and with the consent of the accused, be sentenced in accordance with subsection (a) of this Code section. The probated sentence imposed may be for a period of up to five years. No discharge and dismissal without court adjudication of guilt shall be entered under this subsection until the accused has made full restitution to all victims of the charged offenses. Discharge and dismissal under this Code section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of this Code section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime. Discharge and dismissal under this Code section may not be used to disqualify a person in any application for employment or appointment to office in either the public or private sector. (Code 1933, § 79A-9917, enacted by Ga. L. 1971, p. 271, § 1; Ga. L. 1973, p. 688, § 1; Ga. L. 1974, p. 221, § 3; Ga. L. 1976, p. 1083, § 1; Ga. L. 1992, p. 6, § 16; Ga. L. 1997, p. 1377, § 2; Ga. L. 2004, p. 488, § 1.)

Cross references. — Detection of drugs by Department of Transportation enforcement officers, § 32-6-29. Probation of first offenders, § 42-8-60 et seq.

Editor's notes. — Provisions added by Ga. L. 1976, p. 1083, § 1 were declared unconstitutional in *State v. Millwood*, 242 Ga. 244, 248 S.E.2d 643 (1978), insofar as they attempted to vest jurisdiction in municipal courts to try offenses against the state.

Ga. L. 1997, p. 1377, § 4, not codified by the General Assembly, provides: "It is the intent of the General Assembly to restore the law of this state to that which was generally understood to be the law prior to the decision of the Court of Appeals in *Williams v. State*, 222 Ga. App. 698, Case No. A96A1472, decided August 20, 1996, such that possession of one ounce or less of marijuana is a misdemeanor and the pro-

visions of Code Section 36-32-6 are applicable to such offenses."

Law reviews. — For article on the effect of nolo contendere plea on conviction, see 13 Ga. L. Rev. 723 (1979). For article, "Misdemeanor Sentencing in Georgia," see 7 Ga. St. B.J. 8 (2001). For annual survey of criminal law, see 58 Mercer L. Rev. 83 (2006).

For note, "Substantive Due Process and Felony Treatment of Pot Smokers: The Current Conflict," see 2 Ga. L. Rev. 247 (1968). For note on 1991 amendment of this Code section, see 8 Georgia St. U.L. Rev. 129 (1992).

For comment on *Tant v. State*, 123 Ga. App. 760, 182 S.E.2d 502 (1971), advocating additional reform of Georgia's system of appellate review of criminal cases, see 9 Ga. St. B.J. 490 (1973).

JUDICIAL DECISIONS

Effect of 1997 amendment. — The 1997 amendment to O.C.G.A. § 16-13-2(b) simply restored jurisdiction over cases involving possession of marijuana, less than one ounce, to the state courts, in light of the decision in *Williams v. State*, 222 Ga. App. 698, 475 S.E.2d 667 (1996), and did not impact on defendant's prosecution in superior court, which had jurisdiction to try misdemeanor or felony

offenses. *Hicks v. State*, 228 Ga. App. 235, 494 S.E.2d 342 (1998).

Three days before the defendant pled guilty to a second offense of possession of less than an ounce of marijuana, the governor signed legislation amending O.C.G.A. § 16-13-2 to make possession of this amount a misdemeanor offense in all cases, the trial court erred in entering judgment on a felony conviction.

Calbreath v. State, 235 Ga. App. 638, 510 S.E.2d 145 (1998).

Trial court erred in denying defendant's motion to dismiss the indictment against defendant for felony possession of less than an ounce of marijuana because the legislature did not include a savings clause in the 1997 amendment of O.C.G.A. § 16-13-2 and clearly expressed the legislature's intent that possession of less than an ounce of marijuana is a misdemeanor offense. *Hanson v. State*, 271 Ga. 145, 518 S.E.2d 111 (1999).

Former Code 1933, § 79A-9917 was permissive, not mandatory and absent abuse of discretion, the trial judge's discretion will not be disturbed. *Owens v. State*, 135 Ga. App. 497, 218 S.E.2d 168 (1975) (see O.C.G.A. § 16-13-2).

Construction with other Code sections. — When one count of the accusation filed by the district attorney recited that it was charged under O.C.G.A. § 16-13-30, which is a felony which may not be brought by accusation pursuant to O.C.G.A. § 17-7-70 without the assent of the accused, not on record in the case, nor was it one of those felonies listed in O.C.G.A. § 17-7-70.1 which, under circumstances not present in the case, may be pursued by accusation, the count was considered by the court to be brought under O.C.G.A. § 16-13-2(b), misdemeanor possession of less than an ounce of marijuana. *Chadwick v. State*, 236 Ga. App. 199, 511 S.E.2d 286 (1999).

Constitutionality of O.C.G.A. § 16-13-30(j)(2). — Difference between punishments for purchase of marijuana under O.C.G.A. § 16-13-30(j)(2) and possession of the same amount under O.C.G.A. § 16-13-2(b) does not constitute a denial of equal protection because imposition of a felony sentence under the former applies equally to all those accused of purchasing any amount of the controlled substance and, thus, there is no unconstitutional disparate treatment of similarly situated persons. *State v. Jackson*, 271 Ga. 5, 515 S.E.2d 386 (1999).

Constitutionality of § 16-13-2(b). — O.C.G.A. § 16-13-2(b) did not violate due process by creating a mandatory presumption of guilt. The court interpreted the statute, as the court had before, to

render the statute valid and to carry out the legislative intent of establishing that possession of an ounce or less of marijuana was a misdemeanor. In the Interest of D. H., 285 Ga. 51, 673 S.E.2d 191 (2009).

Preponderance of the evidence test. — Although O.C.G.A. § 16-13-2, which set forth the trial court's authority to institute an alternative to traditional sentencing in drug possession cases, did not establish the state's burden in terminating such situation, the Court of Appeals of Georgia found it analogous to revocation of probation or of first offender status; hence, the preponderance of the evidence test applicable to first offender status was equally applicable in cases involving an alleged violation of a drug court contract. *Wilkinson v. State*, 283 Ga. App. 213, 641 S.E.2d 189 (2006).

Once defendant begins serving a sentence it may not be increased. *Perdue v. State*, 155 Ga. App. 802, 272 S.E.2d 766 (1980).

Attempt to make revoked probated sentence consecutive to intervening sentence amounts to increase in punishment. *Perdue v. State*, 155 Ga. App. 802, 272 S.E.2d 766 (1980).

Time served on probation must be credited to any sentence received, including those cases involving first offender probation. *Perdue v. State*, 155 Ga. App. 802, 272 S.E.2d 766 (1980).

Time served in treatment program. — Probationer, who elected to plead guilty and underwent alternative treatment in a drug court program offered under O.C.G.A. § 16-13-2(a), was not entitled to credit for time spent in treatment when the probationer was subsequently terminated from the program and sentenced on the original crime; moreover, a defendant in the probationer's position, who pled guilty and utilized the benefits of a rehabilitative option in order to avoid an adjudication of guilt, could not withdraw the plea as a matter of right under O.C.G.A. § 17-7-93(b). *Stinson v. State*, 279 Ga. App. 107, 630 S.E.2d 553 (2006).

Exclusion from drug court program did not violate double jeopardy ban. — Denying a defendant access to the drug court program under O.C.G.A.

§ 16-13-2(a), which had been a condition of the defendant's plea bargain, was not a double jeopardy violation since the trial court did not involuntarily withdraw the guilty plea, but offered the defendant the option of withdrawing the plea or accepting one of several alternative sentences. Moreover, agreeing to attend drug court was not a "sentence," and completion of the drug court contract was dependent on the defendant's completing the drug court program. *Evans v. State*, 293 Ga. App. 371, 667 S.E.2d 183 (2008).

Former Code 1933, § 79A-9917 did not deal with question of guilt or innocence, but referred solely to conditional discharge for first offenders charged with possession of one ounce or less of marijuana. *Tift v. State*, 133 Ga. App. 455, 211 S.E.2d 409 (1974) (see O.C.G.A. § 16-13-2).

Jury not to be informed of judge's refusal to grant conditional discharge. — In making determination of guilt or innocence jury should not be informed that accused would have qualified for conditional discharge but for fact that judge chose not to utilize the authority granted by former Code 1933, § 79A-9917. *Tift v. State*, 133 Ga. App. 455, 211 S.E.2d 409 (1974) (see O.C.G.A. § 16-13-2).

Evidence of weight required to establish felony. — While the state established that defendant was in possession of marijuana, there was indeed no evidence to establish its weight; and in the absence of such evidence there was no basis for treating the offense as a felony. *Whatley v. State*, 189 Ga. App. 173, 375 S.E.2d 245, cert. denied, 189 Ga. App. 913, 375 S.E.2d 245 (1988).

To authorize felony punishment. — When evidence is in dispute as to the amount defendant possessed, the jury must be instructed that to authorize felony punishment, the jury must find possession of more than one ounce. *Jones v. State*, 151 Ga. App. 560, 260 S.E.2d 555 (1979).

Evidence insufficient for felony status. — Offense of possession of less than one ounce of marijuana, committed prior to the decision in *Williams v. State*, 222 Ga. App. 698, 475 S.E.2d 667 (1996), was a

misdemeanor, and the conviction of defendant, with a prior conviction for the same offense, did not have felony ramifications. *Hicks v. State*, 228 Ga. App. 235, 494 S.E.2d 342 (1998).

Evidence insufficient to show possession. — Evidence was insufficient to support a conviction of possession of less than one ounce of marijuana when a marijuana cigarette was found in a car in which the defendant was riding. The circumstantial evidence was entirely consistent with the defendant's theory that the defendant was merely a passenger in the car and had nothing to do with the marijuana cigarette; there was no evidence that the defendant was uncooperative, attempted to flee police, behaved erratically, or appeared to be under the influence of drugs; there was no marijuana residue found near the defendant or on the defendant's person; the defendant did not possess drug paraphernalia; and a witness who was also a passenger in the car testified that the defendant, who had gotten a ride home from a nightclub with the driver, did not smoke the cigarette and was not in possession of marijuana on the evening in question. *Kier v. State*, 292 Ga. App. 208, 663 S.E.2d 832 (2008).

Evidence sufficient to show possession. — By showing circumstantially that defendant and two codefendants had equal access to the cocaine and marijuana in defendant's truck, the evidence established that all three were parties to the crime and, thus, guilty of joint constructive possession of the drugs under O.C.G.A. §§ 16-13-2(b) and 16-13-30(b). *Davis v. State*, 270 Ga. App. 777, 607 S.E.2d 924 (2004).

Despite the defendant's denial of any knowledge of the existence of drugs and other contraband in a motel room in which the defendant was the sole occupant, evidence of the contraband found in close proximity to other evidence which the defendant admitted owning, when coupled with the fact that only one key to the room existed, which the defendant admitted to having, and that no one had brought anything into the room since the person the defendant alleged was the owner of the evidence had left, was sufficient to support the defendant's conviction.

tions under O.C.G.A. §§ 16-11-106, 16-13-2, 16-13-30, 16-13-31. *Hall v. State*, 283 Ga. App. 266, 641 S.E.2d 264 (2007).

Evidence supported convictions for misdemeanor marijuana possession and cocaine trafficking under O.C.G.A. §§ 16-13-2 and 16-13-31 when officers executing a search warrant found the defendant alone in a house near bags of marijuana and with the house containing over 28 grams of cocaine, a loaded handgun, and \$596; furthermore, an officer conducting surveillance and using an informant had previously observed the defendant's involvement in the sale of drugs at the home. *Boyd v. State*, 291 Ga. App. 528, 662 S.E.2d 295 (2008).

There was sufficient evidence that the defendant, a juvenile, possessed marijuana under O.C.G.A. § 16-13-2(b). Although the marijuana was in the pocket of the defendant's companion, the defendant had rolling papers with which to smoke the marijuana, and both the defendant and the companion admitted that they had just bought the marijuana and were headed to a construction site to smoke the marijuana. In the Interest of D. H., 285 Ga. 51, 673 S.E.2d 191 (2009).

Because the presence of methamphetamine in defendant's urine constituted circumstantial evidence that defendant knowingly possessed the drug within three days prior to a urine test, and because the state did not have to prove where the drug was actually ingested, the evidence was sufficient to support defendant's conviction and venue under O.C.G.A. § 17-2-2(h). *Harbin v. State*, 297 Ga. App. 877, 678 S.E.2d 553 (2009).

Convictions of drug possession pursuant to O.C.G.A. §§ 16-13-2(b), 16-13-28(a)(1), 16-13-30(a), and (e), were supported by sufficient evidence under circumstances in which, following a stop, an officer found a bag of marijuana in the defendant's pocket, and, after arresting the defendant, the officer also found \$858 in the defendant's pockets and a bottle containing 16 pills of Alprazolam under the dashboard of the car the defendant had been driving; the pills were what remained of a 90-pill prescription issued five days before to a different person. Further, a bag of cocaine was later found in the patrol car where the defendant was held before backup officers arrived.

Noellien v. State, 298 Ga. App. 47, 679 S.E.2d 75 (2009).

Trial court did not err in convicting the defendant of possession of cocaine with the intent to distribute, O.C.G.A. § 16-13-30(b), and possession of marijuana, O.C.G.A. § 16-13-2(b), because the circumstantial evidence established a meaningful connection between the defendant and the contraband, evidence which showed the defendant exercising power and dominion over the drugs found inside the wheel well on the front passenger's side of a car; the jury could infer that the drugs had been recently placed in the wheel well, and because the defendant had fled from the police, had been caught within arm's reach of the drugs, and had a large amount of cash in the defendant's pockets, the jury could infer that the defendant was a drug dealer and that the defendant had placed the drugs in the wheel well to avoid being prosecuted for possessing the drugs. *Wright v. State*, 302 Ga. App. 332, 690 S.E.2d 654 (2010).

State court indictment must affirmatively show first offense. — State court, to invoke provisions of former Code 1933, § 79A-9917, in indictment/accusation forming basis for charges, must affirmatively show that accused was charged with possession of one ounce or less of marijuana and that the accused was a first offender, otherwise all proceedings held in state court were a nullity. *Kent v. State*, 129 Ga. App. 71, 198 S.E.2d 712 (1973) (see O.C.G.A. § 16-13-2(b)).

Jury need not make special finding as to amount where evidence not in conflict. — When evidence is not in conflict as to amount, it is not necessary for the court to charge the jury that the jury must find amount specially. *Coffey v. State*, 141 Ga. App. 254, 233 S.E.2d 243 (1977).

Necessity of jury instruction on misdemeanor possession as lesser included offense. — Defendant was improperly convicted of purchasing marijuana under O.C.G.A. § 16-13-30(j)(1) because the trial court should have given a jury instruction on the lesser included offense of misdemeanor possession of less than one ounce of marijuana under O.C.G.A. § 16-13-2(b) as the defendant

did not pay for the marijuana and testified that the defendant did not intend to purchase the marijuana. *Johnson v. State*, 296 Ga. App. 697, 675 S.E.2d 588 (2009), cert. denied, No. S09C1191, 2009 Ga. LEXIS 420 (Ga. 2009).

Jurisdiction of motion to withdraw guilty plea. — Since judgments of conviction are not entered in cases proceeding under the First Offender Act, O.C.G.A. § 42-8-60 et seq., unless the defendant violates the terms of defendant's probation, the sentencing court retains jurisdiction both for resentencing and to consider a motion to withdraw a guilty plea after the end of the term of court in which the plea was entered. *Tripp v. State*, 223 Ga. App. 73, 476 S.E.2d 844 (1996).

Withdrawal of guilty plea. — Trial court did not abuse the court's discretion in denying the defendant's motion to withdraw a guilty plea to charges of trafficking in methamphetamine and possession of marijuana as the defendant acknowledged, and the record showed, that the trial court advised the defendant of the maximum allowable sentence on both a trafficking in methamphetamine and possession of marijuana charge, as well as the mandatory minimum sentence on the former offense; further, despite the fact that the waiver of rights form the defendant signed incorrectly stated that the maximum term of imprisonment was 30 years, rather than 31 years, given the aforementioned, the mistake did not amount to a manifest injustice requiring reversal of the court's refusal to allow withdrawal. *Rodriguez v. State*, 280 Ga. App. 423, 634 S.E.2d 182 (2006).

Exclusion for drug court program did not violate equal protection. — Defendant was excluded from a drug court program under O.C.G.A. § 16-13-2(a) because the defendant had a mental illness, was under a doctor's supervision, and was taking four prescription medications, not because of the defendant's HIV status. As the state's interest in preserving the defendant's health was rationally related to the state's decision to exclude the defen-

dant from the program, there was no equal protection violation. *Evans v. State*, 293 Ga. App. 371, 667 S.E.2d 183 (2008).

Appeals under section are discretionary. — Because the defendant was sentenced after unsuccessful participation in an O.C.G.A. § 16-13-2(a) drug court program, the defendant's appeal was heard despite failing to comply with the discretionary appeal procedure of O.C.G.A. § 5-6-35(a)(5); in such cases, hearing appeals was discretionary, but that had not been clear prior to the instant case so the appellate court heard the defendant's case. *Andrews v. State*, 276 Ga. App. 428, 623 S.E.2d 247 (2005).

Because the drug court program under O.C.G.A. § 16-13-2(a) is similar to the first offender statute of O.C.G.A. § 42-8-60 and because § 42-8-60 appeals are discretionary under O.C.G.A. § 5-6-35(a)(5), the discretionary appeal procedures of O.C.G.A. § 5-6-35(a)(5) must be followed when appealing after violation of the conditions of the drug court program. *Andrews v. State*, 276 Ga. App. 428, 623 S.E.2d 247 (2005).

Cited in *Papp v. State*, 129 Ga. App. 718, 201 S.E.2d 157 (1973); *Russell v. State*, 132 Ga. App. 35, 207 S.E.2d 619 (1974); *Stinnett v. State*, 132 Ga. App. 261, 208 S.E.2d 16 (1974); *Wilson v. State*, 136 Ga. App. 70, 221 S.E.2d 62 (1975); *McCann v. State*, 137 Ga. App. 445, 224 S.E.2d 99 (1976); *Smith v. State*, 139 Ga. App. 515, 228 S.E.2d 705 (1976); *Hawkins v. State*, 141 Ga. App. 31, 232 S.E.2d 377 (1977); *Alexander v. State*, 239 Ga. 810, 239 S.E.2d 18 (1977); *Aycock v. State*, 146 Ga. App. 489, 246 S.E.2d 489 (1978); *State v. Millwood*, 242 Ga. 244, 248 S.E.2d 643 (1978); *Corbitt v. State*, 166 Ga. App. 311, 304 S.E.2d 123 (1983); *Sloan v. State*, 172 Ga. App. 620, 323 S.E.2d 834 (1984); *Barnes v. State*, 255 Ga. 396, 339 S.E.2d 229 (1986); *Luke v. State*, 178 Ga. App. 614, 344 S.E.2d 452 (1986); *Banks v. State*, 229 Ga. App. 414, 493 S.E.2d 923 (1997); *Mincey v. Head*, 206 F.3d 1106 (11th Cir. 2000); *Johnson v. State*, 289 Ga. App. 27, 656 S.E.2d 161 (2007).

OPINIONS OF THE ATTORNEY GENERAL

Prosecuting in superior court for possessing one ounce or less makes crime felony punishable as misdemeanor under former Code 1933, § 79A-9917 (see

O.C.G.A. § 16-13-2(b)) and does not invoke former Code 1933, § 27-901 (see O.C.G.A. § 17-6-1). 1974 Op. Att'y Gen. No. U74-79.

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d., Drugs and Controlled Substances, § 199.

Am. Jur. Proof of Facts. — Insanity Defense, 41 POF2d 615.

C.J.S. — 14 C.J.S., Chemical Dependents, § 13 et seq. 24 C.J.S., Criminal Law, § 2144 et seq. 28A C.J.S., Drugs and Narcotics, § 489 et seq.

U.L.A. — Uniform Controlled Substances Act (U.L.A.) § 407.

ALR. — Federal prosecutions based on manufacture, importation, transportation, possession, sale, or use of LSD, 22 ALR3d 1325.

Sufficiency of prosecution proof that substance defendant is charged with possessing, selling, or otherwise unlawfully dealing in, is marijuana, 75 ALR3d 717.

Validity of a state statute imposing mandatory sentence or prohibiting granting of probation or suspension of sentence for narcotics offenses, 81 ALR3d 1192.

Constitutionality of state legislation imposing criminal penalties for personal possession or use of marijuana, 96 ALR3d 225.

16-13-3. Penalty for abandonment of dangerous drugs, poisons, or controlled substances.

Any person who shall abandon, in a public place, any dangerous drug, poison, or controlled substance as defined by Article 2 or Article 3 of this chapter shall be guilty of a misdemeanor. (Code 1933, § 79A-9918, enacted by Ga. L. 1977, p. 625, § 9.)

Cross references. — Detection of drugs by Department of Transportation enforcement officers, § 32-6-29.

JUDICIAL DECISIONS

Abandonment is not a lesser included offense of possession and, even if there was evidence that defendant prosecuted for possession of cocaine might have committed the separate act of abandonment, defendant was not entitled to a charge on that crime. *Billingsley v. State*, 220 Ga. App. 69, 467 S.E.2d 377 (1996).

Evidence sufficient for conviction. — Evidence supported defendant's conviction for abandonment of a controlled substance in a public place, in violation of O.C.G.A. § 16-13-3, because defendant was approached by undercover officers, and when defendant realized that they

were officers, defendant threw the crack cocaine that defendant was holding at a trash barrel on the abandoned residential lot where defendant was standing; the area was within the definition of "public place" under O.C.G.A. § 16-1-3(15) as the area was viewed by persons other than the members of defendant's family or household. *Woods v. State*, 275 Ga. App. 471, 620 S.E.2d 660 (2005).

Evidence was sufficient to find beyond a reasonable doubt that the defendant was guilty of manufacturing methamphetamine, O.C.G.A. § 16-13-30(b), conspiring to possess methamphetamine, O.C.G.A.

§ 16-13-3, and possessing methamphetamine, § 16-13-30(a) because the state was not required to show that the defendant was in sole or actual possession of the methamphetamine but could establish the element of possession by showing that the defendant was in joint constructive possession of the contraband; the evidence allowed for a finding that the defendant lived at the residence where the methamphetamine was found, that methamphetamine was found in the master bedroom atop the same dresser as a driver's license bearing the defendant's name and the residential address, that

stored in a lockbox underneath the bed in that room were recipes for producing methamphetamine or a similar substance, along with digital scales associated with the drug trade, and that the defendant's residential premises was being used as a clandestine methamphetamine lab. *Edwards v. State*, 306 Ga. App. 713, 703 S.E.2d 130 (2010).

Cited in *Recoba v. State*, 179 Ga. App. 31, 345 S.E.2d 81 (1986); *Mincey v. Head*, 206 F.3d 1106 (11th Cir. 2000); *Duggan v. Duggan-Schlitz*, 246 Ga. App. 127, 539 S.E.2d 840 (2000).

RESEARCH REFERENCES

ALR. — Federal prosecutions based on manufacture, importation, transportation, possession, sale, or use of LSD, 22 ALR3d 1325.

Propriety of lesser-included-offense charge in state prosecution of narcotics

defendant — Marijuana cases, 1 ALR6th 549.

Propriety of lesser-included-offense charge in state prosecution of narcotics defendant — Cocaine cases, 2 ALR6th 551.

16-13-4. Approval by Food and Drug Administration as prerequisite to sale of controlled substances and dangerous drugs.

(a) No controlled substance or dangerous drug shall be sold for dispensing unless the controlled substance, as defined in Code Section 16-13-21, or the dangerous drug, as defined in Code Section 16-13-71:

(1) Is approved by the Food and Drug Administration for resale;

(2) Has a new approved drug application number (known as an NDA number) unless excepted by the Food and Drug Administration; or

(3) Has an approved abbreviated new drug application number (known as an ANDA number) unless excepted by the Food and Drug Administration.

(b) Any person who violates subsection (a) of this Code section shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment of not less than one year nor more than five years. (Ga. L. 1981, p. 557, § 6; Ga. L. 1985, p. 1219, § 1; Ga. L. 1989, p. 14, § 16.)

ARTICLE 2

REGULATION OF CONTROLLED SUBSTANCES

Cross references. — Disciplinary action for student of public educational in-

stitution convicted of controlled substance offense, § 20-1-23. Disciplinary action for

student of nonpublic educational institution convicted of controlled substance abuse, § 20-1-24.

Law reviews. — For annual survey of criminal law and procedure, see 35 Mercer L. Rev. 103 (1983).

For note on 2000 amendments of

O.C.G.A. §§ 16-13-26 to 16-13-28, see 17 Georgia St. U.L. Rev. 85 (2000).

For comment on *Tant v. State*, 123 Ga. App. 760, 182 S.E.2d 502 (1971), advocating additional reform of Georgia's system of appellate review of criminal cases, see 9 Ga. St. B.J. 490 (1973).

JUDICIAL DECISIONS

Constitutionality. — Georgia Controlled Substances Act (see O.C.G.A. § 16-13-20 et seq.) is not unconstitutional as violating Ga. Const. 1976, Art. III, Sec. VII, Para. IV (see now Ga. Const. 1983, Art. III, Sec. V, Para. III), which prohibits inclusion of more than one subject matter in any Act of the General Assembly. *Lord v. State*, 235 Ga. 342, 219 S.E.2d 425 (1975).

Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., is not an unconstitutional delegation of legislative authority on ground that the General Assembly has failed to maintain control over determination of whether a substance should fall within its purview, since O.C.G.A. § 16-13-22 provides that State Board of Pharmacy shall consider nine factors and shall make findings after considering those nine factors. Consideration of the statutory factors is mandatory. *Ward v. State*, 248 Ga. 60, 281 S.E.2d 503 (1981).

Possession distinguished from DUI. — Possession of controlled substance is separate and distinct from conduct required to establish offense of driving under influence of intoxicants, although the offenses may arise out of the same conduct, i.e., driving. *Rogers v. State*, 166 Ga. App. 299, 304 S.E.2d 108 (1983).

When exclusive possession of an automobile is shown, there is a rebuttable presumption that the owner has possession of the property contained therein. This presumption does not apply if it can be shown that the defendant had not been in possession or control for a period before discovery of contraband or where others had equal access to the automobile. *Ledesma v. State*, 251 Ga. 487, 306 S.E.2d 629 (1983), cert. denied, 464 U.S. 1069, 104 S. Ct. 975, 79 L. Ed. 2d 213 (1984).

Evidence of access by others. — Mere presence of contraband on premises

occupied by accused is insufficient to sustain conviction where there is evidence of access by others. *Shockley v. State*, 166 Ga. App. 182, 303 S.E.2d 519 (1983).

State established that controlled substance was in defendant's possession. — See *White v. State*, 168 Ga. App. 609, 309 S.E.2d 848 (1983).

Pharmacy license as defense to drug possession charge. — Whether an individual has a license or is otherwise lawfully permitted to have in the individual's possession narcotic drugs is a matter of defense and not an element of the offense. *Woods v. State*, 233 Ga. 347, 211 S.E.2d 300 (1974), appeal dismissed, 422 U.S. 1002, 95 S. Ct. 2623, 45 L. Ed. 2d 667 (1975).

A sale of drugs is complete when the seller delivers the drugs to the feigned buyer. *Robinson v. State*, 164 Ga. App. 652, 297 S.E.2d 751 (1982).

No entrapment occurs when idea of selling illegal drugs is not planted in the defendant's mind by an undercover officer, but the defendant is predisposed to make such a sale and the officer merely provides the opportunity. *Sibley v. State*, 166 Ga. App. 142, 303 S.E.2d 465 (1983).

Use of a "narcotics" dog, especially trained to detect marijuana and narcotics, is an authorized investigative technique. *Lockhart v. State*, 166 Ga. App. 555, 305 S.E.2d 22 (1983).

Evidence from search incident to arrest admissible. — Admission into evidence of substances contained within boxes and envelopes found on the defendant's person during a search incident to the defendant's arrest for a violation of the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., is not error. *Dasher v. State*, 166 Ga. App. 237, 304 S.E.2d 87 (1983).

Written confession is not involuntarily given when the confession is in-

duced by the arresting officer's promise of "cooperation," which offer is directed toward obtaining information regarding the source of the illegal drugs or regarding other individuals who might be involved in illegal drugs and which does not refer to the defendant's giving a statement or confession to the police. *Worley v. State*, 166 Ga. App. 794, 305 S.E.2d 485 (1983).

Identification of contraband. — Trial judge is charged with the final responsibility of evaluating the links of the chain of custody to ascertain if the evidence of identification of contraband has become so attenuated as to become irrelevant or incompetent as an aid in determining the issue of guilt or innocence. *Thomas v. State*, 166 Ga. App. 559, 305 S.E.2d 151 (1983).

Trial court may, as matter of discretion, refuse to permit examination by defendant of substance used as evidence of violation of the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq. *Patterson v. State*, 238 Ga. 204, 232 S.E.2d 233, cert. denied, 431 U.S. 970, 98 S. Ct. 248, 53 L. Ed. 2d 1067 (1977).

Defendant's right to have substance analyzed by expert of defendant's choosing. — Defendant charged with possession or sale of a prohibited substance has a general right to have expert of defendant's choosing analyze it independently. Where defendant's conviction or acquittal is dependent upon identification of substance as contraband, due process of law requires that analysis of substance not be left completely within province of state. *Patterson v. State*, 238 Ga. 204, 232 S.E.2d 233, cert. denied, 431 U.S. 970, 98 S. Ct. 248, 53 L. Ed. 2d 1067 (1977).

Motion for independent examination of substance to be used as evidence must be timely made. *Patterson v. State*, 238 Ga. 204, 232 S.E.2d 233, cert. denied, 431 U.S. 970, 98 S. Ct. 248, 53 L. Ed. 2d 1067 (1977).

Defendant's expert should conduct analysis in state laboratory. — When the defendant's expert is to examine substance to be used as evidence of violation of the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., appropriate

safeguards to ensure evidence is properly preserved would generally require expert to conduct examination in state laboratory. *Patterson v. State*, 238 Ga. 204, 232 S.E.2d 233, cert. denied, 431 U.S. 970, 98 S. Ct. 248, 53 L. Ed. 2d 1067 (1977).

Counsel's failure to object to use of defendant's prior conviction to fix length of sentence. — While the trial court used defendant's prior conviction to fix the length of defendant's sentence for a violation of the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., defendant's failure to object to such evidence waived the trial court's error; however, as defendant's attorney failed to object to the trial court's use of defendant's prior conviction, defendant received ineffective assistance and was entitled to a new trial. *Turner v. State*, 259 Ga. App. 902, 578 S.E.2d 570 (2003).

Weight and believability of evidence are jury questions. — Ultimate weight and believability of the evidence to show the true nature of the allegedly illegal substance and the identity of the substance's seller should be left to the jury. *Thomas v. State*, 166 Ga. App. 559, 305 S.E.2d 151 (1983).

Evidence sufficient for conviction. — See *Choice v. State*, 168 Ga. App. 28, 308 S.E.2d 1 (1983); *Stewart v. State*, 168 Ga. App. 154, 308 S.E.2d 615 (1983); *Grimes v. State*, 168 Ga. App. 372, 308 S.E.2d 863 (1983); *Herndon v. State*, 187 Ga. App. 77, 369 S.E.2d 264 (1988); *Holmes v. State*, 187 Ga. App. 214, 369 S.E.2d 533 (1988); *Anfield v. State*, 188 Ga. App. 345, 373 S.E.2d 51 (1988); *Jones v. State*, 191 Ga. App. 332, 381 S.E.2d 575 (1989); *Howard v. State*, 191 Ga. App. 418, 382 S.E.2d 159 (1989).

Evidence that marijuana was found in the bedroom closet of the defendant's home and not affirmatively showing that anyone but the defendant had actual access to the closet was sufficient for a conviction of possession of marijuana. *Burrell v. State*, 171 Ga. App. 648, 320 S.E.2d 810 (1984).

Evidence that the defendant lived for one year, along with defendant's spouse and small child, in the house searched, that the old refrigerator where marijuana was found was only 30 steps from the

house, that the path between the house and the refrigerator was well worn and led directly from the house to the refrigerator, supported the jury's conclusion that the defendant "possessed the contraband drugs knowingly, exclusively or at least jointly." *Norris v. State*, 171 Ga. App. 676, 320 S.E.2d 886 (1984).

Defendant's admission of cocaine use, along with other evidence showing that cocaine was on the seat and floorboard on the passenger side of the automobile in which defendant was a passenger, was more than sufficient to authorize a rational trier of fact to find that defendant was guilty of possession of cocaine beyond a reasonable doubt. *Hall v. State*, 188 Ga. App. 322, 373 S.E.2d 32 (1988).

When a search of defendant's car produced, among other things, drugs, syringes, scales, and a slip of paper with amounts of money listed next to various names and initials, there was sufficient evidence from which the jury was authorized to find defendant guilty beyond a reasonable doubt of trafficking in methamphetamine. *Yarbrough v. State*, 264 Ga. App. 848, 592 S.E.2d 681 (2003).

Denial of an appeal bond is not an abuse of discretion when the appellant admits that appellant has been addicted to drugs and that appellant has supported that addiction by shoplifting, resulting in previous arrests for that offense. *Corbitt v. State*, 167 Ga. App. 576, 307 S.E.2d 133 (1983).

Cited in *Lord v. State*, 235 Ga. 342, 219 S.E.2d 425 (1975); *Hall v. State*, 151 Ga. App. 700, 261 S.E.2d 442 (1979); *Arnold v. State*, 155 Ga. App. 581, 271 S.E.2d 714 (1980); *Parker v. State*, 155 Ga. App. 617, 271 S.E.2d 871 (1980); *Prickett v. State*, 155 Ga. App. 668, 272 S.E.2d 534 (1980); *Hollingsworth v. State*, 155 Ga. App. 878, 273 S.E.2d 639 (1980); *Jones v. State*, 155

Ga. App. 926, 274 S.E.2d 1 (1980); *Davidson v. State*, 156 Ga. App. 457, 274 S.E.2d 807 (1980); *Bennett v. State*, 156 Ga. App. 617, 275 S.E.2d 701 (1980); *Murray v. State*, 157 Ga. App. 596, 278 S.E.2d 2 (1981); *Mitchell v. State*, 157 Ga. App. 683, 278 S.E.2d 192 (1981); *Gaylor v. State*, 247 Ga. 759, 279 S.E.2d 207 (1981); *Bailey v. State*, 158 Ga. App. 96, 279 S.E.2d 334 (1981); *Vaughn v. State*, 160 Ga. App. 283, 287 S.E.2d 277 (1981); *Carl v. State*, 160 Ga. App. 464, 287 S.E.2d 379 (1981); *Campbell v. State*, 160 Ga. App. 561, 287 S.E.2d 591 (1981); *Strong v. Slaton*, 510 F. Supp. 161 (N.D. Ga. 1981); *Rauschenberg v. State*, 161 Ga. App. 331, 291 S.E.2d 58 (1982); *Ledford v. State*, 162 Ga. App. 221, 291 S.E.2d 82 (1982); *Kennedy v. State*, 162 Ga. App. 269, 291 S.E.2d 117 (1982); *Seabrooks v. State*, 164 Ga. App. 747, 297 S.E.2d 745 (1982); *Landers v. State*, 164 Ga. App. 657, 297 S.E.2d 748 (1982); *Brooker v. State*, 164 Ga. App. 775, 298 S.E.2d 48 (1982); *Hicks v. Georgia State Bd. of Pharmacy*, 553 F. Supp. 314 (N.D. Ga. 1982); *Bedford v. State*, 165 Ga. App. 232, 299 S.E.2d 129 (1983); *Kemp v. Spradlin*, 250 Ga. 829, 301 S.E.2d 874 (1983); *Law v. State*, 165 Ga. App. 687, 302 S.E.2d 570 (1983); *Croom v. State*, 165 Ga. App. 676, 302 S.E.2d 598 (1983); *Martin v. State*, 165 Ga. App. 760, 302 S.E.2d 614 (1983); *Gumina v. State*, 166 Ga. App. 592, 305 S.E.2d 37 (1983); *Gallimore v. State*, 166 Ga. App. 601, 305 S.E.2d 164 (1983); *Recoba v. State*, 167 Ga. App. 447, 306 S.E.2d 713 (1983); *Morgan v. State*, 168 Ga. App. 310, 308 S.E.2d 583 (1983); *Lush v. State*, 168 Ga. App. 740, 310 S.E.2d 287 (1983); *Hester v. State*, 187 Ga. App. 46, 369 S.E.2d 278 (1988); *Glover v. State*, 188 Ga. App. 330, 373 S.E.2d 39 (1988); *Allison v. State*, 188 Ga. App. 460, 373 S.E.2d 273 (1988); *West v. State*, 194 Ga. App. 620, 391 S.E.2d 673 (1990).

OPINIONS OF THE ATTORNEY GENERAL

Applicability to state and local agencies. — State and local agencies are subject to the requirements of the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., but are not subject to

the requirements of the Dangerous Drug Act, O.C.G.A. § 16-13-70 et seq., since there is no definition of "person" specifically applicable to the Dangerous Drug Act. 1986 Op. Att'y Gen. No. 86-28.

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Drugs and Controlled Substances, § 8.

C.J.S. — 28 C.J.S., Drugs and Narcotics, § 210 et seq.

ALR. — Entrapment to commit offense with respect to narcotics law, 33 ALR3d 883.

Liability for discharge of at-will employee for refusal to submit to drug testing, 79 ALR4th 105.

Propriety of stop and search by law enforcement officers based solely on drug courier profile, 37 ALR5th 1.

PART 1

SCHEDULES, OFFENSES, AND PENALTIES

Editor's notes. — Ga. L. 2011, p. 659, § 2, effective July 1, 2011, redesignated the former provisions of Article 2 of Chap-

ter 13, Title 16 as Part 1, Article 2 of Chapter 13, Title 16.

16-13-20. Short title.

This article shall be known and may be cited as the "Georgia Controlled Substances Act." (Code 1933, § 79A-801, enacted by Ga. L. 1974, p. 221, § 1.)

Law reviews. — For annual survey of criminal law, see 38 Mercer L. Rev. 129 (1986). For survey article on criminal law

and procedure for the period from June 1, 2002 through May 31, 2003, see 55 Mercer L. Rev. 117 (2003).

JUDICIAL DECISIONS

Evidence sufficient for conviction. — Because defendant was the driver of a vehicle in which cocaine was found, the jury could conclude that defendant constructively possessed the cocaine in the vehicle and actually possessed the cocaine that fell from defendant's sock; consequently, the evidence was sufficient to convict defendant for violating O.C.G.A. § 16-13-20 et seq. *Cody v. State*, 275 Ga. App. 140, 619 S.E.2d 811 (2005).

Evidence supporting the defendant's conviction for methamphetamine possession was sufficient because the presumption of possession and control attached since the state presented evidence that the defendant was the sole resident of the house present during the execution of the search warrant when the methamphetamine was found in a common area of the house; the presumption of possession was not the sole evidence connecting the defendant to the crime of possession because the arresting officer testified that the de-

fendant exhibited clear signs of methamphetamine intoxication. *Martin v. State*, 305 Ga. App. 764, 700 S.E.2d 871 (2010).

Evidence was sufficient to support the defendant's drug possession convictions because: (1) when the defendant was stopped, after attempting to avoid an early morning traffic safety checkpoint, the defendant fled from the defendant's vehicle, leaving the defendant's screaming child behind; (2) the defendant was pursued and apprehended by sheriff's deputies; (3) the deputies found a dry bag of marijuana and a bag of cocaine that appeared to be sticky with saliva on the ground, which was wet from rain, along the trail upon which the defendant had just run; and (4) evidence was presented of the defendant fleeing from the police in three similar incidents. *Dix v. State*, 307 Ga. App. 684, 705 S.E.2d 903 (2011).

Sentencing for attempt to possess

marijuana with intent to distribute.

— There was sufficient evidence to support defendant's conviction for criminal attempt to possess marijuana with intent to distribute, in violation of O.C.G.A. § 16-13-33, because defendant participated in a reverse undercover sting operation for the sale of a large amount of marijuana, defendant was seen with the money, and defendant was clearly an active participant in the transaction; sentencing under O.C.G.A. § 16-13-33 was appropriate and did not violate the rule of lenity with respect to the sentencing range for attempt under O.C.G.A. § 16-4-6(b), as the former statute was specifically enacted for purposes of providing sentencing to convictions under the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., rendering the latter sentencing statute inapplicable to the present prosecution. *Woods v. State*, 279 Ga. 28, 608 S.E.2d 631 (2005).

Control over substance. — Sufficient evidence supported defendant's cocaine possession conviction, even though only one witness, a police officer, testified about cocaine under defendant's body, while others did not see the contraband; the jury was authorized to conclude that defendant had control over and possessed the cocaine found underneath the defendant's body. *Smith v. State*, 276 Ga. App. 677, 624 S.E.2d 272 (2005).

Trial court did not manifestly abuse the court's discretion when the court found by a preponderance of the evidence that the substance found in the car in which a probationer was riding was cocaine and that the probationer had constructive possession of the cocaine because the driver of the car denied that the cocaine was the driver's and stated that the cocaine was thrown to the floorboard under the driver's feet by the probationer. *Thurmond v. State*, 304 Ga. App. 587, 696 S.E.2d 516 (2010).

No charge on entrapment warranted. — Trial court did not err in refusing the defendant's request to charge the

jury on the defense of entrapment because there was no evidence that the defendant was improperly induced to commit the crime of selling drugs through a confidential informant's undue persuasion, incitement, or deceit; the informant gave the defendant money in exchange for pills during two transactions and cocaine during another transaction, and the defendant told the informant that the defendant needed to keep \$300 to buy more pills, and the defendant demonstrated the defendant's knowledge about the drugs when the defendant identified one type of pill that the defendant was selling to the informant as "green apples". *Graham v. State*, 305 Ga. App. 772, 700 S.E.2d 863 (2010).

Cited in *Durrett v. State*, 136 Ga. App. 114, 220 S.E.2d 92 (1975); *Tolbert v. State*, 138 Ga. App. 724, 227 S.E.2d 416 (1976); *Partain v. State*, 238 Ga. 207, 232 S.E.2d 46 (1977); *Patterson v. State*, 238 Ga. 204, 232 S.E.2d 233 (1977); *Calloway v. State*, 141 Ga. App. 125, 232 S.E.2d 603 (1977); *Gilliland v. State*, 142 Ga. App. 374, 235 S.E.2d 780 (1977); *Autry v. State*, 150 Ga. App. 584, 258 S.E.2d 268 (1979); *Anglin v. State*, 151 Ga. App. 570, 260 S.E.2d 563 (1979); *Wrenn v. State*, 151 Ga. App. 877, 261 S.E.2d 783 (1979); *Murphy v. State*, 155 Ga. App. 128, 270 S.E.2d 335 (1980); *Gregoroff v. State*, 158 Ga. App. 363, 280 S.E.2d 373 (1981); *Childs v. State*, 158 Ga. App. 376, 280 S.E.2d 401 (1981); *Raymond v. State*, 160 Ga. App. 367, 287 S.E.2d 84 (1981); *Morris v. State*, 161 Ga. App. 141, 288 S.E.2d 102 (1982); *Wireman v. State*, 163 Ga. App. 439, 295 S.E.2d 530 (1982); *Lester v. State*, 163 Ga. App. 604, 295 S.E.2d 566 (1982); *Davis v. State*, 164 Ga. App. 633, 298 S.E.2d 615 (1982); *Leverette v. State*, 188 Ga. App. 866, 374 S.E.2d 803 (1988); *Thompson v. State*, 201 Ga. App. 646, 411 S.E.2d 886 (1991); *Mitchell v. State*, 206 Ga. App. 672, 426 S.E.2d 171 (1992); *Fair v. State*, 284 Ga. 165, 664 S.E.2d 227 (2008); *Weaver v. State*, 299 Ga. App. 718, 683 S.E.2d 361 (2009).

RESEARCH REFERENCES

U.L.A. — Uniform Controlled Substances Act (U.L.A.) § 604.

ALR. — Minimum quantity of drug required to support claim that defendant

is guilty of criminal "possession" of drug under state law, 4 ALR5th 1.

Validity, construction, and application of state "drug kingpin" statutes, 30 ALR5th 121.

Prosecution of mother for prenatal substance abuse based on endangerment of or delivery of controlled substance to child, 70 ALR5th 461.

16-13-21. Definitions.

As used in this article, the term:

(0.5) "Addiction" means a primary, chronic, neurobiologic disease with genetic, psychosocial, and environmental factors influencing its development and manifestations. It is characterized by behaviors that include the following: impaired control drug use, craving, compulsive use, and continued use despite harm. Physical dependence and tolerance are normal physiological consequences of extended opioid therapy for pain and are not the same as addiction.

(1) "Administer" means the direct application of a controlled substance, whether by injection, inhalation, ingestion, or by any other means, to the body of a patient or research subject by:

(A) A practitioner or, in his or her presence, by his or her authorized agent; or

(B) The patient or research subject at the direction and in the presence of the practitioner.

(1.1) "Agency" means the Georgia Drugs and Narcotics Agency established pursuant to Code Section 26-4-29.

(2) "Agent" of a manufacturer, distributor, or dispenser means an authorized person who acts on behalf of or at the direction of a manufacturer, distributor, or dispenser. It does not include a common or contract carrier, public warehouseman, or employee of the carrier or warehouseman.

(2.1) "Board" means the State Board of Pharmacy or its designee, so long as such designee is another state entity.

(3) "Bureau" means the Georgia Bureau of Investigation.

(4) "Controlled substance" means a drug, substance, or immediate precursor in Schedules I through V of Code Sections 16-13-25 through 16-13-29 and Schedules I through V of 21 C.F.R. Part 1308.

(5) "Conveyance" means any object, including aircraft, vehicle, or vessel, but not including a person, which may be used to carry or transport a substance or object.

(6) "Counterfeit substance" means:

(A) A controlled substance which, or the container or labeling of which, without authorization, bears the trademark, trade name, or

other identifying mark, imprint, number, or device, or any likeness thereof, of a manufacturer, distributor, or dispenser other than the person who in fact manufactured, distributed, or dispensed the controlled substance;

(B) A controlled substance or noncontrolled substance, which is held out to be a controlled substance or marijuana, whether in a container or not which does not bear a label which accurately or truthfully identifies the substance contained therein; or

(C) Any substance, whether in a container or not, which bears a label falsely identifying the contents as a controlled substance.

(6.1) "Dangerous drug" means any drug, other than a controlled substance, which cannot be dispensed except upon the issuance of a prescription drug order by a practitioner authorized under this chapter.

(6.2) "DEA" means the United States Drug Enforcement Administration.

(7) "Deliver" or "delivery" means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.

(8) "Dependent," "dependency," "physical dependency," "psychological dependency," or "psychic dependency" means and includes the state of adaptation that is manifested by drug class specific signs and symptoms that can be produced by abrupt cessation, rapid dose reduction, decreasing blood level of the drug, and administration of an antagonist. Physical dependence, by itself, does not equate with addiction.

(9) "Dispense" means to deliver a controlled substance to an ultimate user or research subject by or pursuant to the lawful order of a practitioner, including the prescribing, administering, packaging, labeling, or compounding necessary to prepare the substance for that delivery, or the delivery of a controlled substance by a practitioner, acting in the normal course of his or her professional practice and in accordance with this article, or to a relative or representative of the person for whom the controlled substance is prescribed.

(10) "Dispenser" means a person that delivers a Schedule II, III, IV, or V controlled substance to the ultimate user but shall not include:

(A) A pharmacy licensed as a hospital pharmacy by the Georgia Board of Pharmacy pursuant to Code Section 26-4-110;

(B) An institutional pharmacy that serves only a health care facility, including, but not limited to, a nursing home, an interme-

diate care home, a personal care home, or a hospice program, which provides patient care and which pharmacy dispenses such substances to be administered and used by a patient on the premises of the facility;

(C) A practitioner or other authorized person who administers such a substance; or

(D) A pharmacy operated by, on behalf of, or under contract with the Department of Corrections for the sole and exclusive purpose of providing services in a secure environment to prisoners within a penal institution, penitentiary, prison, detention center, or other secure correctional institution. This shall include correctional institutions operated by private entities in this state which house inmates under the Department of Corrections.

(11) "Distribute" means to deliver a controlled substance, other than by administering or dispensing it.

(12) "Distributor" means a person who distributes.

(12.05) "FDA" means the United States Food and Drug Administration.

(12.1) "Imitation controlled substance" means:

(A) A product specifically designed or manufactured to resemble the physical appearance of a controlled substance such that a reasonable person of ordinary knowledge would not be able to distinguish the imitation from the controlled substance by outward appearances; or

(B) A product, not a controlled substance, which, by representations made and by dosage unit appearance, including color, shape, size, or markings, would lead a reasonable person to believe that, if ingested, the product would have a stimulant or depressant effect similar to or the same as that of one or more of the controlled substances included in Schedules I through V of Code Sections 16-13-25 through 16-13-29.

(13) "Immediate precursor" means a substance which the State Board of Pharmacy has found to be and by rule identifies as being the principal compound commonly used or produced primarily for use, and which is an immediate chemical intermediary used or likely to be used, in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail, or limit manufacture.

(14) "Isomers" means stereoisomers (optical isomers), geometrical isomers, and structural isomers (chain and positional isomers) but shall not include functional isomers.

(15) "Manufacture" means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container, except that this term does not include the preparation, compounding, packaging, or labeling of a controlled substance:

(A) By a practitioner as an incident to his or her administering or dispensing of a controlled substance in the course of his or her professional practice; or

(B) By a practitioner or by his or her authorized agent under his or her supervision for the purpose of, or as an incident to, research, teaching, or chemical analysis and not for sale.

(16) "Marijuana" means all parts of the plant of the genus *Cannabis*, whether growing or not, the seeds thereof, the resin extracted from any part of such plant, and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin; but shall not include samples as described in subparagraph (P) of paragraph (3) of Code Section 16-13-25 and shall not include the completely defoliated mature stalks of such plant, fiber produced from such stalks, oil, or cake, or the completely sterilized samples of seeds of the plant which are incapable of germination.

(17) "Narcotic drug" means any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(A) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate;

(B) Any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical to any of the substances referred to in subparagraph (A) of this paragraph, but not including the isoquinoline alkaloids of opium;

(C) Opium poppy and poppy straw; or

(D) Coca leaves and any salt, compound, derivative, stereoisomers of cocaine, or preparation of coca leaves, and any salt, compound, stereoisomers of cocaine, derivative, or preparation thereof which is chemically equivalent or identical to any of these substances, but not including decocainized coca leaves or extractions of coca leaves which do not contain cocaine or ecgonine.

(18) "Opiate" means any substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability. It does not include, unless specifically designated as controlled under Code Section 16-13-22, the dextrorotatory isomer of 3-methoxy-n-methylmorphinan and its salts (dextromethorphan). It does include its racemic and levorotatory forms.

(19) "Opium poppy" means the plant of the species *Papaver somniferum* L., except its seeds.

(19.1) "Patient" means the person who is the intended consumer of a drug for whom a prescription is issued or for whom a drug is dispensed.

(20) "Person" means an individual, corporation, government, or governmental subdivision or agency, business trust, estate, trust, partnership, or association, or any other legal entity.

(21) "Poppy straw" means all parts, except the seeds, of the opium poppy after mowing.

(22) "Potential for abuse" means and includes a substantial potential for a substance to be used by an individual to the extent of creating hazards to the health of the user or the safety of the public, or the substantial potential of a substance to cause an individual using that substance to become dependent upon that substance.

(23) "Practitioner" means:

(A) A physician, dentist, pharmacist, podiatrist, scientific investigator, or other person licensed, registered, or otherwise authorized under the laws of this state to distribute, dispense, conduct research with respect to, or to administer a controlled substance in the course of professional practice or research in this state;

(B) A pharmacy, hospital, or other institution licensed, registered, or otherwise authorized by law to distribute, dispense, conduct research with respect to, or to administer a controlled substance in the course of professional practice or research in this state;

(C) An advanced practice registered nurse acting pursuant to the authority of Code Section 43-34-25. For purposes of this chapter and Code Section 43-34-25, an advanced practice registered nurse is authorized to register with the federal Drug Enforcement Administration and appropriate state authorities; or

(D) A physician assistant acting pursuant to the authority of subsection (e.1) of Code Section 43-34-103. For purposes of this

chapter and subsection (e.1) of Code Section 43-34-103, a physician assistant is authorized to register with the federal Drug Enforcement Administration and appropriate state authorities.

(23.1) "Prescriber" means a physician, dentist, scientific investigator, or other person licensed, registered, or otherwise authorized under the laws of this state to prescribe a controlled substance in the course of professional practice or research in this state.

(24) "Production" includes the manufacture, planting, cultivation, growing, or harvesting of a controlled substance.

(25) "Registered" or "register" means registration as required by this article.

(26) "Registrant" means a person who is registered under this article.

(26.1) "Schedule II, III, IV, or V controlled substance" means a controlled substance that is classified as a Schedule II, III, IV, or V controlled substance under Code Section 16-13-26, 16-13-27, 16-13-28, or 16-13-29, respectively, or under the Federal Controlled Substances Act, 21 U.S.C. Section 812.

(27) "State," when applied to a part of the United States, includes any state, district, commonwealth, territory, insular possession thereof, or any area subject to the legal authority of the United States.

(27.1) "Tolerance" means a physiologic state resulting from regular use of a drug in which an increased dosage is needed to produce a specific effect or a reduced effect is observed with a constant dose over time. Tolerance may or may not be evident during opioid treatment and does not equate with addiction.

(28) "Ultimate user" means a person who lawfully possesses a controlled substance for his or her own use, for the use of a member of his or her household, or for administering to an animal owned by him or her or by a member of his or her household or an agent or representative of the person.

(29) "Noncontrolled substance" means any drug or other substance other than a controlled substance as defined by paragraph (4) of this Code section. (Code 1933, § 79A-802, enacted by Ga. L. 1967, p. 296, § 1; Ga. L. 1974, p. 221, § 1; Ga. L. 1978, p. 2237, § 1; Ga. L. 1979, p. 859, § 4; Ga. L. 1980, p. 1746, § 3; Ga. L. 1982, p. 3, § 16; Ga. L. 1982, p. 1264, §§ 1, 3; Ga. L. 1982, p. 2370, §§ 1, 2; Ga. L. 1982, p. 2403, §§ 10, 15; Ga. L. 1984, p. 22, § 16; Ga. L. 1985, p. 149, § 16; Ga. L. 1986, p. 10, § 16; Ga. L. 1986, p. 1555, §§ 1, 2; Ga. L. 1988, p. 1065, § 1; Ga. L. 1999, p. 643, § 5.1; Ga. L. 2003, p. 349, § 1; Ga. L.

2006, p. 125, § 2/SB 480; Ga. L. 2009, p. 859, § 4/HB 509; Ga. L. 2011, p. 659, § 1/SB 36.)

The 2009 amendment, effective July 1, 2009, in subparagraph (23)(C), substituted “Code Section 43-34-25” for “Code Section 43-34-26.3” twice and, in subparagraph (23)(D), substituted “physician assistant” for “physician’s assistant” twice.

The 2011 amendment, effective July 1, 2011, inserted “or her” throughout this Code section; added paragraphs (0.5), (1.1), and (2.1); substituted “Georgia Bureau of Investigation” for “Drug Enforcement Administration, United States Department of Justice, or its successor agency” in paragraph (3); rewrote former paragraph (8), which read: “‘Dependent,’ ‘dependency,’ ‘physical dependency,’ ‘psychological dependency,’ or ‘psychic dependency’ means and includes the state of dependence by an individual toward or upon a substance, arising from the use of that substance, being characterized by behavioral and other responses which include the loss of self-control with respect to that substance, or a strong compulsion to use that substance on a continuous basis in order to experience some psychic

effect resulting from the use of that substance by that individual, or to avoid any discomfort occurring when the individual does not use that substance.”; rewrote former paragraph (10), which read: “‘Dispenser’ means a practitioner who dispenses.”; deleted a comma following “substance” in subparagraph (12.1)(A); inserted a comma in paragraph (13); in paragraph (14), substituted the second occurrence of “)” for “,” and deleted “)” from the end; in subparagraphs (17)(B) and (17)(D), substituted “to” for “with”; added “or” at the end of subparagraph (17)(C); added paragraph (19.1); deleted “veterinarian,” following “podiatrist,” in subparagraph (23)(A); and added paragraphs (23.1), (26.1), and (27.1).

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1986, substituted “stereoisomers” for “stereoisomers” twice near the middle of subparagraph (17)(D).

Law reviews. — For survey article on criminal law and procedure, see 34 Mercer L. Rev. 89 (1982).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION MARIJUANA

General Consideration

Definition of “manufacture” applies to the cultivation or planting of marijuana. *Hunt v. State*, 222 Ga. App. 66, 473 S.E.2d 157 (1996).

When a defendant possesses most of the objects and substances needed to “prepare” or “process” methamphetamine by the red phosphorous technique, a rational trier of fact, applying the broad definition of “manufacture” under O.C.G.A. § 16-13-21(15), may find beyond a reasonable doubt that the defendant was “preparing” or “processing” that drug. *Murrell v. State*, 273 Ga. App. 735, 615 S.E.2d 780 (2005).

“Distribute.” — Because defendant delivered cocaine to an informant and used a

paper to aid in the cocaine’s distribution, the evidence was sufficient to find defendant guilty of distributing cocaine and using a communication facility to facilitate a violation of the Georgia Controlled Substance Act, specifically violations of O.C.G.A. §§ 16-13-21(11) and 16-13-32.3(a). *Capers v. State*, 273 Ga. App. 427, 615 S.E.2d 126 (2005).

Methaqualone. — Because the inscription “714” signifies something associated with methaqualone, this inscription on the caps of bottles containing an unidentified substance is a label falsely identifying the contents as methaqualone. *Luck v. State*, 163 Ga. App. 657, 295 S.E.2d 584 (1982).

Possession outside of original container. — One lawfully possessing a con-

trolled substance may lawfully possess it out of its original container. *Jones v. State*, 145 Ga. App. 224, 243 S.E.2d 645 (1978).

Defendant's right to have substance analyzed by expert of his choosing. — Defendant charged with possession or sale of a prohibited substance has a general right to have an expert of defendant's choosing analyze it independently. Where defendant's conviction or acquittal is dependent upon identification of substance as contraband, due process of law requires that analysis of the substance not be left completely within province of state. *Patterson v. State*, 238 Ga. 204, 232 S.E.2d 233, cert. denied, 431 U.S. 970, 98 S. Ct. 248, 53 L. Ed. 2d 1067 (1977).

Evidence sufficient to infer manufacturing. — Evidence showed that defendant possessed a combination of items and substances generally found together solely for the purpose of manufacturing methamphetamine, and the evidence was sufficient to support reasonable inferences of "preparation" and "processing," pursuant to O.C.G.A. § 16-13-21(15), and thus of manufacturing, even though the evidence did not show that defendant had the completed drug or all of the items needed to manufacture the completed drug. *Murrell v. State*, 273 Ga. App. 735, 615 S.E.2d 780 (2005).

Jury instruction on possession of prescription drugs harmless. — Although the trial court erred in charging the jury that only a person to whom, or for whose use, a controlled substance had been prescribed, sold or dispensed, may lawfully possess the same, in light of the overwhelming evidence against defendant, the error was harmless. *Morris v. State*, 212 Ga. App. 779, 442 S.E.2d 792 (1994).

Reduced jury instruction not erroneous. — Trial court did not commit reversible error for failure to include in the court's charge a definition of "intent to distribute" when the transcript revealed that the trial court did charge the jury regarding intent, the meaning of distribution being left to the word's ordinary and common dictionary meaning. *Watkins v. State*, 206 Ga. App. 575, 426 S.E.2d 26 (1992).

Jury instruction insufficient. — Jury charge failed to properly define the offenses of trafficking in methamphetamine and possession of methamphetamine with intent to distribute because all the jury was told was that it was a violation of the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., to traffic or possess with intent to distribute methamphetamine; the instructions given completely failed to inform the jury about the manner in which the offense of trafficking in methamphetamine or the offense of possessing methamphetamine with intent to distribute may have been committed. As such, the jury did not receive sufficient instructions to guide the jury in determining the defendant's guilt or innocence on these charges. *Torres v. State*, 298 Ga. App. 158, 679 S.E.2d 757 (2009).

Recharge equating attempt to distribute with completed distribution offense. — There was no error in court's recharge equating possession with an attempt to distribute with the completed offense of distribution where the court instructed the jury according to the definitions set forth in O.C.G.A. § 16-13-21(7) and (11). *Bowens v. State*, 209 Ga. App. 130, 433 S.E.2d 102 (1993).

Imitation controlled substance. — Rule of lenity did not apply to a defendant's conviction of felony possession with intent to distribute a noncontrolled substance, O.C.G.A. § 16-13-30.1, because the evidence did not show that the substance at issue was an "imitation controlled substance" for purposes of misdemeanor unlawful manufacture, distribution, or possession with intent to distribute of imitation controlled substances, O.C.G.A. § 16-13-30.2; although the noncontrolled substance at issue was in common packaging for narcotics, the evidence did not show that the evidence appeared as a "dosage unit" based on color, shape, size, or markings or specifically designed or manufactured to resemble a controlled substance. Therefore, the evidence failed to establish that the defendant's conduct fell within § 16-13-30.2(a). *Diaz v. State*, 296 Ga. App. 589, 676 S.E.2d 252 (2009).

Rule of lenity did not apply in sale of imitation controlled substance. — Trial court did not err by refusing to apply

General Consideration (Cont'd)

the rule of lenity with regard to a defendant's conviction for selling a counterfeit substance because the evidence revealed that the substance would not fall under either definition of "imitation controlled substance" set forth in O.C.G.A. § 16-13-21(12.1)(A) as the parties stipulated only that the substance recovered was not a controlled substance and there was no evidence presented that it was specifically designed or manufactured to resemble the physical appearance of a controlled substance. As a result, the rule of lenity did not apply, and the trial court properly sentenced the defendant for a felony. *Chandler v. State*, 294 Ga. App. 27, 668 S.E.2d 510 (2008).

Cited in *Green v. State*, 124 Ga. App. 469, 184 S.E.2d 194 (1971); *Dunkum v. State*, 138 Ga. App. 321, 226 S.E.2d 133 (1976); *Robinson v. State*, 244 Ga. 15, 357 S.E.2d 523 (1979); *Parks v. State*, 150 Ga. App. 446, 258 S.E.2d 66 (1979); *Baxter v. State*, 154 Ga. App. 861, 270 S.E.2d 71 (1980); *Hartley v. State*, 159 Ga. App. 157, 282 S.E.2d 684 (1981); *Abrams v. State*, 164 Ga. App. 553, 297 S.E.2d 324 (1982); *Skinner v. State*, 182 Ga. App. 370, 355 S.E.2d 726 (1987); *Helmeci v. State*, 230 Ga. App. 866, 498 S.E.2d 326 (1998); *Massey v. State*, 267 Ga. App. 482, 600 S.E.2d 437 (2004); *Thomas v. State*, 287 Ga. App. 500, 651 S.E.2d 801 (2007); *Carolina Tobacco Co. v. Baker*, 295 Ga. App. 115, 670 S.E.2d 811 (2008); *Armstrong v. State*, 298 Ga. App. 855, 681 S.E.2d 662 (2009).

Marijuana

Either spelling of word "marijuana" or "marihuana" is accepted as being correct. *Allen v. State*, 120 Ga. App. 533, 171 S.E.2d 380 (1969).

Leaves of marijuana are not excluded. *Stowers v. State*, 143 Ga. App. 859, 240 S.E.2d 227 (1977).

Effect of part of plant being stalk. — When the state's expert testified that in the expert's opinion and estimate, approximately two-thirds of a marijuana plant was stalk, the inference was reasonable that the remaining one-third was chargeable marijuana under O.C.G.A. § 16-13-21(16).

Lang v. State, 165 Ga. App. 576, 302 S.E.2d 683, cert. denied, 464 U.S. 937, 104 S. Ct. 346, 78 L. Ed. 2d 312 (1983).

Conclusive, scientific tests required. — Defendant's conviction for possession of marijuana had to fail because in the absence of conclusive, scientific tests, the possibility remained that the substance at issue was not marijuana. *Chambers v. State*, 260 Ga. App. 48, 579 S.E.2d 71 (2003).

There is no requirement that state prove which species of marijuana is seized. *Stowers v. State*, 143 Ga. App. 859, 240 S.E.2d 227 (1977).

Indictment need not describe what portion of marijuana plant defendant had in defendant's possession, as that was the very purpose of defining marijuana former Code 1933, § 79A-802. *Allen v. State*, 120 Ga. App. 533, 171 S.E.2d 380 (1969) (see O.C.G.A. § 16-13-21).

Odor of unburned marijuana. — Trial court properly denied defendant's motion to suppress, as the trial court was authorized to believe the police officer's testimony that the officer was qualified to detect the odor of unburned marijuana based on the officer's training and experience, and, thus, that the officer recognized the smell of the 10 pounds of unburned marijuana defendant had in the trunk of defendant's car despite defense counsel's attempt to impeach the officer with the officer's testimony from a prior case that there was no difference between the smell of burnt and unburned marijuana; accordingly, the motion to suppress was properly denied and defendant's conviction for a violation of the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., was affirmed. *King v. State*, 267 Ga. App. 546, 600 S.E.2d 647 (2004).

For discussion of scope of definition of marijuana. — See *Aycock v. State*, 146 Ga. App. 489, 246 S.E.2d 489 (1978); *Osborn v. State*, 161 Ga. App. 132, 291 S.E.2d 22 (1982).

THC considered marijuana. — Definition of "marijuana" under the Motor Vehicles Act (see O.C.G.A. §§ 40-6-391 and 40-6-393) not only includes THC for purposes of determining whether one is driving under the influence, but requires

that THC be considered "marijuana" in order for O.C.G.A. § 40-6-391(a)(6) to be actionable, since THC in the blood or urine is the method by which the presence of marijuana is detected for purposes of determining whether one is driving under the influence thereof. *Cronan v. State*, 236 Ga. App. 374, 511 S.E.2d 899 (1999).

High percentage of THC does not prevent treatment as marijuana. — Any substance which is a resin, compound, manufacture, salt, derivative mixture, or preparation of cannabis plant shall be treated as marijuana, even though it may contain a high percentage of tetrahydrocannabinols (THC). For state to sustain charge of possession or distribution of THC under schedule I of O.C.G.A. § 16-13-25, it must prove that

THC is not a compound, derivative, or preparation of the cannabis plant; that is, it must prove that the THC is synthetically derived. *Aycock v. State*, 146 Ga. App. 489, 246 S.E.2d 489 (1978); *Osborn v. State*, 161 Ga. App. 132, 291 S.E.2d 22 (1982).

State not required to prove THC content of marijuana. — Despite the defendant's contrary claim, the state was not required to prove the tetrahydrocannabinol (THC) content of the plant material seized in a prosecution for trafficking in marijuana; further, THC was treated separately in the criminal code as a Schedule I drug under O.C.G.A. § 16-13-25(3)(P). *Trujillo v. State*, 286 Ga. App. 438, 649 S.E.2d 573 (2007).

OPINIONS OF THE ATTORNEY GENERAL

State Board of Pharmacy regulates dispensing drugs in hospitals. — Dispensing drugs in hospitals by machine or otherwise is a matter which the legislature has left to the State Board of Pharmacy to regulate through its rule-making power. 1969 Op. Att'y Gen. No. 69-85.

Intern's or resident's authority to administer and dispense narcotics. — Intern or resident accepted for specialty or

residency training in a hospital approved by Composite State Board of Medical Examiners may prescribe, administer, and dispense narcotic drugs to the extent required by duties of the intern's position or by the intern's program of training for a period of two years and for such additional period as the board by application may determine. 1971 Op. Att'y Gen. No. 71-157.

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Drugs and Controlled Substances, §§ 1 et seq., 18.

C.J.S. — 28 C.J.S., Drugs and Narcotics, §§ 6 et seq., 219.

U.L.A. — Uniform Controlled Substances Act (U.L.A.) § 101.

ALR. — Marijuana, psilocybin, peyote, or similar drugs of vegetable origin as narcotics for purposes of drug prosecution, 50 ALR3d 1164.

LSD, STP, MDA, or other chemically synthesized hallucinogenic or psychedelic substances as narcotics for purposes of drug prosecution, 50 ALR3d 1284.

Propriety of lesser-included-offense charge in state prosecution of narcotics defendant — Marijuana cases, 1 ALR6th 549.

Propriety of lesser-included-offense charge in state prosecution of narcotics defendant — Cocaine cases, 2 ALR6th 551.

Propriety of instruction of jury on "conscious avoidance" of knowledge of nature of substance or transaction in prosecution for possession or distribution of drugs, 109 ALR Fed. 710.

16-13-22. Administration of article; standards and schedules.

(a) The State Board of Pharmacy shall administer this article and shall add substances to or reschedule all substances enumerated in the schedules in Code Sections 16-13-25 through 16-13-29 pursuant to the procedures of Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." In making a determination or identification regarding a substance, the State Board of Pharmacy shall consider the following factors:

- (1) The actual or relative potential for abuse;
- (2) The scientific evidence of its pharmacological effect, if known;
- (3) The state of current scientific knowledge regarding the substance;
- (4) The history and current pattern of abuse;
- (5) The scope, duration, and significance of abuse;
- (6) The risk to the public health;
- (7) The potential of the substance to produce psychic or physiological dependence liability;
- (8) Whether the substance is an immediate precursor of a substance already controlled under this article; and
- (9) The designation, deletion, or rescheduling of a substance under federal law controlling controlled substances.

(b) After considering the factors enumerated in subsection (a) of this Code section, the State Board of Pharmacy shall make findings with respect thereto and cause the publication of such findings as a rule, in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," controlling the substance if it finds the substance has a potential for abuse.

(c) If the State Board of Pharmacy identifies a substance as an immediate precursor, substances which are precursors of the controlled substance shall not be subject to control solely because they are precursors of the controlled substance.

(d) Authority to control under this Code section does not extend to distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in Title 3 or 48. (Code 1933, § 79A-803, enacted by Ga. L. 1974, p. 221, § 1; Ga. L. 1982, p. 3, § 16.)

Cross references. — State Board of Pharmacy generally, § 26-4-30 et seq.

JUDICIAL DECISIONS

Constitutionality. — Former Code 1933, § 79A-803 was not unconstitutional as violative of Ga. Const. 1976, Art. I, Sec. II, Para. IV, and Art. III, Sec. I, Para. I (see now Ga. Const. 1983, Art. I, Sec. II, Para. III, and Art. III, Sec. I, Para. I), which provisions deal with separation of powers and delegation of legislative power respectively. *Harmon v. State*, 235 Ga. 329, 219 S.E.2d 441 (1975) (see O.C.G.A. § 16-13-22).

Former Code 1933, § 79A-801 et seq. was not an unconstitutional delegation of legislative authority on the ground that

the General Assembly had failed to maintain control over the determination of whether a substance should fall within its purview, since these provisions provide that the State Board of Pharmacy “shall consider” nine factors and shall make findings after considering those nine factors. Consideration of the statutory factors was mandatory. *Ward v. State*, 248 Ga. 60, 281 S.E.2d 503 (1981) (see O.C.G.A. § 16-13-20 et seq.).

Cited in *Cochran v. State*, 136 Ga. App. 94, 220 S.E.2d 83 (1975); *Davis v. State*, 143 Ga. App. 329, 238 S.E.2d 289 (1977).

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Drugs and Controlled Substances, § 8.

C.J.S. — 28 C.J.S., Drugs and Narcotics, §§ 69, 70 210 et seq.

U.L.A. — Uniform Controlled Substances Act (U.L.A.) § 201.

16-13-23. Nomenclature for controlled substances.

The controlled substances listed in the schedules in Code Sections 16-13-25 through 16-13-29 are included by whatever official, common, usual, chemical, or trade name designated. (Code 1933, § 79A-804, enacted by Ga. L. 1974, p. 221, § 1.)

JUDICIAL DECISIONS

Trade name must be linked to its scheduled equivalent before former Code 1933, § 79A-804 was operative.

Elrod v. State, 143 Ga. App. 331, 238 S.E.2d 291 (1977) (see O.C.G.A. § 16-13-23).

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Drugs and Controlled Substances, § 8.

C.J.S. — 28 C.J.S., Drugs and Narcotics, § 219 et seq.

U.L.A. — Uniform Controlled Substances Act (U.L.A.) § 202.

ALR. — Harrison Narcotic Act, 13 ALR 858; 39 ALR 236.

16-13-24. Establishment of schedules of controlled substances.

(a) There are established five schedules of controlled substances, to be known as Schedules I, II, III, IV, and V. The schedules shall consist of the substances listed in Code Sections 16-13-25 through 16-13-29. The schedules so established shall be updated and republished by the State Board of Pharmacy on an annual basis.

(b) Except in the case of an immediate precursor, a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to the drug or other substance. The findings for each of the schedules are as follows:

(1) Schedule I:

- (A) The drug or other substance has a high potential for abuse;
- (B) The drug or other substance has no currently accepted medical use in treatment in the United States; and
- (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

(2) Schedule II:

- (A) The drug or other substance has a high potential for abuse;
- (B) The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions; and
- (C) Abuse of the drug or other substance may lead to severe psychological or physical dependence.

(3) Schedule III:

- (A) The drug or other substance has a potential for abuse less than the drugs or other substances in Schedules I and II;
- (B) The drug or other substance has a currently accepted medical use in treatment in the United States; and
- (C) Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.

(4) Schedule IV:

- (A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in Schedule III;
- (B) The drug or other substance has a currently accepted medical use in treatment in the United States; and
- (C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in Schedule III.

(5) Schedule V:

- (A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in Schedule IV;
- (B) The drug or other substance has a currently accepted medical use in treatment in the United States; and

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in Schedule IV. (Code 1933, § 79A-805, enacted by Ga. L. 1974, p. 221, § 1; Ga. L. 1982, p. 3, § 16.)

Cross references. — Authority of director of Georgia Drugs and Narcotics Agency to compile and distribute pam-

phlet listing unlawful narcotics and dangerous drugs, § 26-4-29.

JUDICIAL DECISIONS

Constitutionality. — Former Code 1933, § 79A-805 was not unconstitutional as violative of Ga. Const. 1976, Art. I, Sec. II, Para. IV, and Art. III, Sec. I, Para. I (see now Ga. Const. 1983, Art. I, Sec. II, Para. III, and Art. III, Sec. I, Para. I), which provisions deal with separation of powers and delegation of legislative power respectively. *Harmon v. State*, 235 Ga. 329, 219

S.E.2d 441 (1975) (see O.C.G.A. § 16-13-25).

Cited in *Cadle v. State*, 136 Ga. App. 232, 221 S.E.2d 59 (1975); *Aycock v. State*, 146 Ga. App. 489, 246 S.E.2d 489 (1978); *Wood v. State*, 156 Ga. App. 810, 275 S.E.2d 694 (1980); *Hicks v. Georgia State Bd. of Pharmacy*, 553 F. Supp. 314 (N.D. Ga. 1982).

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Drugs and Controlled Substances, § 8.

C.J.S. — 28 C.J.S., Drugs and Narcotics, §§ 211, 212, 219.

U.L.A. — Uniform Controlled Substances Act (U.L.A.) §§ 203, 205, 207, 209, 211.

16-13-25. Schedule I.

The controlled substances listed in this Code section are included in Schedule I:

(1) Any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, unless specifically excepted, pursuant to this article, whenever the existence of these isomers, esters, ethers, and salts is possible within the specific chemical designation:

- (A) Acetylmethadol;
- (B) Allylprodine;
- (C) Reserved;
- (D) Alphameprodine;
- (E) Alphamethadol;
- (F) Benzethidine;
- (G) Betacetylmethadol;
- (H) Betameprodine;

- (I) Betamethadol;
- (J) Betaprodine;
- (K) Clonitazene;
- (L) Dextromoramide;
- (M) Dextromorphan;
- (N) Diampromide;
- (O) Diethylthiambutene;
- (P) Dimenoxadol;
- (Q) Dimetheptanol;
- (R) Dimethylthiambutene;
- (S) Dioxaphetyl butyrate;
- (T) Dipipanone;
- (U) Ethylmethylthiambutene;
- (V) Etonitazene;
- (W) Etoxidene;
- (X) Furethidine;
- (Y) Hydroxypethidine;
- (Z) Ketobemidone;
- (AA) Levomoramide;
- (BB) Levophenacilmorphan;
- (CC) Morpheridine;
- (DD) Noracymethadol;
- (EE) Norlevorphanol;
- (FF) Normethadone;
- (GG) Norpipanone;
- (HH) Phenadoxone;
- (II) Phenampromide;
- (JJ) Phenomorphan;
- (KK) Phenoperidine;
- (LL) Piritramide;
- (MM) Proheptazine;

- (NN) Properidine;
- (OO) Propiram;
- (PP) Racemoramide;
- (QQ) Trimeperidine;

(2) Any of the following opium derivatives, their salts, isomers, and salts of isomers, unless specifically excepted, whenever the existence of these salts, isomers, and salts of isomers is possible within the specific chemical designation:

- (A) Acetorphine;
- (B) Acetyldihydrocodeine;
- (C) Benzylmorphine;
- (D) Codeine methylbromide;
- (E) Codeine-N-Oxide;
- (F) Cyprenorphine;
- (G) Desomorphine;
- (H) Dihydromorphine;
- (I) Etorphine;
- (J) Heroin;
- (K) Hydromorphenol;
- (L) Methyldesorphine;
- (M) Methyldihydromorphine;
- (N) Morphine methylbromide;
- (O) Morphine methylsulfonate;
- (P) Morphine-N-Oxide;
- (Q) Myrophine;
- (R) Nicocodeine;
- (S) Nicomorphine;
- (T) Normorphine;
- (U) Pholcodine;
- (V) Thebacon;

(3) Any material, compound, mixture, or preparation which contains any quantity of the following hallucinogenic substances, their

salts, isomers (whether optical, position, or geometrics), and salts of isomers, unless specifically excepted, whenever the existence of these salts, isomers, and salts of isomers is possible within the specific chemical designation:

- (A) 3, 4-methylenedioxyamphetamine;
- (B) 5-methoxy-3, 4-methylenedioxyamphetamine;
- (C) 3, 4, 5-trimethoxyamphetamine;
- (D) Bufotenine;
- (E) Diethyltryptamine;
- (F) Dimethyltryptamine;
- (G) 4-methyl-2, 5-dimethoxyamphetamine;
- (H) Ibogaine;
- (I) Lysergic acid diethylamide;
- (J) Mescaline;
- (K) Peyote;
- (L) N-ethyl-3-piperidyl benzilate;
- (M) N-methyl-3-piperidyl benzilate;
- (N) Psilocybin;
- (O) Psilocyn (Psilocin);
- (P) Tetrahydrocannabinols which shall include, but are not limited to:
 - (i) All synthetic or naturally produced samples containing more than 15 percent by weight of tetrahydrocannabinols; and
 - (ii) All synthetic or naturally produced tetrahydrocannabinol samples which do not contain plant material exhibiting the external morphological features of the plant cannabis;
- (Q) 2, 5-dimethoxyamphetamine;
- (R) 4-bromo-2, 5-dimethoxyamphetamine;
- (S) 4-methoxyamphetamine;
- (T) Cyanoethylamphetamine;
- (U) (1-phenylcyclohexyl) ethylamine;
- (V) 1-(1-phenylcyclohexyl) pyrrolidine;
- (W) Phencyclidine;

- (X) 1-piperidinocyclohexanecarbonitrile;
- (Y) 1-phenyl-2-propanone (phenylacetone);
- (Z) 3, 4-Methylenedioxymethamphetamine (MDMA);
- (AA) 1-methyl-4-phenyl-4-propionoxypiperidine;
- (BB) 1-(2-phenylethyl)-4-phenyl-4-acetyloxypiperidine;
- (CC) 3-methylfentanyl;
- (DD) N-ethyl-3, 4-methylenedioxyamphetamine;
- (EE) Para-fluorofentanyl;
- (FF) 2,5-Dimethoxy-4-Ethylamphetamine;
- (GG) Cathinone;
- (HH) MPPP (1-Methyl-4-Phenyl-4-Propionoxypiperidine);
- (II) PEPAP (1-(2-phenethyl)-4 phenyl-4-acetoxypiperide);
- (JJ) Alpha-Methylthiofentanyl;
- (KK) Acetyl-Alpha-Methylfentanyl;
- (LL) 3-Methylthiofentanyl;
- (MM) Beta-Hydroxyfentanyl;
- (NN) Thiofentanyl;
- (OO) 3,4-Methylenedioxy-N-Ethylamphetamine;
- (PP) 4-Methylaminorex;
- (QQ) N-Hydroxy-3,4-Methylenedioxyamphetamine;
- (RR) Beta-Hydroxy-3-Methylfentanyl;
- (SS) Chlorophenylpiperazine (CPP);
- (TT) N, N-Dimethylamphetamine;
- (UU) 1-(1-(2-thienyl)cyclohexyl)pyrrolidine;
- (VV) 4-Bromo-2,5-Dimethoxyphenethylamine (DMPE);
- (WW) Alpha-Ethyltryptamine;
- (XX) Methcathinone;
- (YY) Aminorex;
- (ZZ) 4-iodo-2,5-dimethoxyamphetamine;
- (AAA) 4-chloro-2,5-dimethoxyamphetamine;
- (BBB) 3,4-Methylenedioxyprovalerone (MDPV);

- (CCC) 4-Methylmethcathinone (Mephedrone);
- (DDD) 3,4-Methylenedioxymethcathinone (Methylone);
- (EEE) 4-Methoxymethcathinone;
- (FFF) 4-Fluoromethcathinone;

(4) Any material, compound, mixture, or preparation which contains any of the following substances having a stimulant effect on the central nervous system, including its salts, isomers, and salts of isomers, unless specifically excepted, whenever the existence of these salts, isomers, and salts of isomers is possible within the specific chemical designation:

- (A) Fenethylline;
- (B) N-(1-benzyl-4-piperidyl)-N-phenylpropanamide (benzyl-fentanyl);
- (C) N-(1-(2-thienyl)methyl-4-piperidyl)-N-phenylpropanamide (thienylfentanyl);

(5) Any material, compound, mixture, or preparation which contains any quantity of the following substances, their salts, isomers (whether optical, position, or geometrics), and salts of isomers, unless specifically excepted, whenever the existence of these substances, their salts, isomers, and salts of isomers is possible within the specific chemical designation:

(A) Gamma hydroxybutyric acid (gamma hydroxy butyrate); provided, however, that this does not include any amount naturally and normally occurring in the human body; and

(B) Sodium oxybate, when the FDA approved form of this drug is not:

- (i) In a container labeled in compliance with subsection (a) or (b) of Code Section 26-3-8; and

(ii) In the possession of:

- (I) A registrant permitted to dispense the drug;
- (II) Any person other than to whom the drug was prescribed; or
- (III) Any person who attempts to or does unlawfully possess, sell, distribute, or give this drug to any other person;

(6) Notwithstanding the fact that Schedule I substances have no currently accepted medical use, the General Assembly recognizes certain of these substances which are currently accepted for certain limited medical uses in treatment in the United States but have a

high potential for abuse. Accordingly, unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of methaqualone, including its salts, isomers, optical isomers, salts of their isomers, and salts of these optical isomers, is included in Schedule I;

(7) 2,5-Dimethoxy-4-(n)-propylthiophenethylamine (2C-T-7);

(8) 1-(3-Trifluoromethylphenyl) Piperazine (TFMPP);

(9) N-Benzylpiperazine (BZP);

(10) 5-Methoxy-N,N-Diisopropyltryptamine (5-MeO-DIPT);

(11) Alpha-Methyltryptamine (AMT);

(12) Any material, compound, mixture, or preparation which contains any quantity of the following substances, their salts, isomers (whether optical, positional, or geometric), homologues, and salts of isomers and homologues, unless specifically excepted, whenever the existence of these salts, isomers, homologues, and salts of isomers and homologues is possible within the specific chemical designation:

(A) 1-pentyl-3-(1-naphthoyl)indole (JWH-018);

(B) 1,1-dimethylheptyl-11-hydroxy-delta-8-tetrahydrocannabinol (HU-210; (6a, 10a)-9-(hydroxymethyl)-6,6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c]chromen-1-ol);

(C) 2-(3-hydroxycyclohexyl)-5-(2-methyloctan-2-yl)phenol (CP 47,497);

(D) 1-[2-(4-Morpholinyl)ethyl]-3-(1-naphthoyl)indole (JWH-200);

(E) 2-(2-Methoxyphenyl)-1-(1-pentylindole-3-yl) ethanone (JWH-250);

(F) 4-Methoxynaphthalen-1-yl-(1-pentylindole-3-yl) methanone (JWH-081). (Code 1933, § 79A-806, enacted by Ga. L. 1974, p. 221, § 1; Ga. L. 1978, p. 1668, § 6; Ga. L. 1979, p. 859, § 5; Ga. L. 1980, p. 1746, § 4; Ga. L. 1981, p. 557, § 3; Ga. L. 1982, p. 2403, §§ 11, 16; Ga. L. 1984, p. 22, § 16; Ga. L. 1984, p. 1019, § 1; Ga. L. 1985, p. 1219, § 2; Ga. L. 1986, p. 1555, § 3; Ga. L. 1987, p. 261, § 1; Ga. L. 1989, p. 233, § 1; Ga. L. 1990, p. 8, § 16; Ga. L. 1990, p. 640, § 1; Ga. L. 1992, p. 1131, § 1; Ga. L. 1994, p. 169, §§ 1-3, 3.1; Ga. L. 1996, p. 356, § 1; Ga. L. 2001, p. 816, § 1; Ga. L. 2002, p. 415, § 16; Ga. L. 2003, p. 349, § 2; Ga. L. 2005, p. 1028, § 1/SB 89; Ga. L. 2006, p. 219, § 14/HB 1054; Ga. L. 2008, p. 169, §§ 1, 2/HB 1090; Ga. L. 2010, p. 338, § 1/HB 1309; Ga. L. 2010, p. 860, § 1/SB 353; Ga. L. 2011, p. 656, §§ 1, 2/SB 93.)

The 2010 amendments. — The first 2010 amendment, effective May 24, 2010, substituted a semicolon for a period at the end of paragraph (11) and added paragraph (12). The second 2010 amendment, effective June 3, 2010, substituted the present provisions of subparagraph (3)(SS) for the former provisions, which read: “Reserved”.

The 2011 amendment, effective May 13, 2011, added subparagraphs (3)(BBB) through (3)(FFF); substituted a semicolon for a period at the end of subparagraph (12)(C); and added subparagraphs (12)(D) through (12)(F).

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1986, in subparagraph (3)(DD) “N-ethyl-3” was substituted for “n-ethyl-3”.

Editor’s notes. — Ga. L. 2010, p. 338, not codified by the General Assembly, provides:

“WHEREAS, the General Assembly finds that there is a growing use of the unregulated synthetic cannabinoids commonly known as K2 or synthetic marijuana; and

“WHEREAS, preliminary studies indicate that the three synthetic cannabinoid substances unregulated in Georgia are from three to over 100 times more potent than THC, the active ingredient found in marijuana; and

“WHEREAS, many states as well as the federal government have already included

one or more of these chemical compounds on Schedules of Controlled Substances, but none of these chemicals are currently listed on Georgia’s Schedule of Controlled Substances; and

“WHEREAS, synthetic cannabinoids are referred to as the new marijuana, and K2 is gaining in popularity at an alarming rate among high school and college students and persons on probation and parole; and

“WHEREAS, while having the same or stronger physiological effects as high potency marijuana, synthetic marijuana or K2 does not show a positive reading in an urinalysis test which adds to the desirability and increased growth among drug abusers and increases the threat to public health and safety by avoiding detection; and

“WHEREAS, the General Assembly should address the growing threat of synthetic cannabinoids to the health, safety, and welfare of our citizens before the problem becomes epidemic in the State of Georgia.”

Administrative rules and regulations. — Registration requirements under Georgia Controlled Substances Act, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Georgia State Board of Pharmacy, Chapter 480-20.

Law reviews. — For survey article on criminal law and procedure, see 34 Mercer L. Rev. 89 (1982).

JUDICIAL DECISIONS

“Marijuana” defined. — Construction of § 16-13-21(16) with O.C.G.A. § 16-13-25(3) as to what constitutes marijuana. *Osborn v. State*, 161 Ga. App. 132, 291 S.E.2d 22 (1982).

Marijuana and THC. — Any sample containing tetrahydrocannabinols (THC) which would otherwise fall under the definition of marijuana shall be considered marijuana unless it either contains more than 15 percent by weight of THC or does not exhibit the external morphological features of the plant cannabis. *Osborn v. State*, 161 Ga. App. 132, 291 S.E.2d 22 (1982).

Since a prosecution for misdemeanor possession of marijuana cannot be insti-

tuted on the basis of a blood or urine test which shows “positive” for marijuana, because such positive showings will be based upon the presence of THC “without the morphological features” of the marijuana plant and are thus excluded from the definition of “marijuana” under the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., prosecutions for possession of marijuana based upon positive blood or urine samples must be brought as a felony prosecution for possession of a Schedule I drug, i.e. THC. *Cronan v. State*, 236 Ga. App. 374, 511 S.E.2d 899 (1999).

Despite the defendant’s contrary claim, the state was not required to prove the tetrahydrocannabinol (THC) content of

the plant material seized in a prosecution for trafficking in marijuana; further, THC was treated separately in the criminal code as a Schedule I drug under O.C.G.A. § 16-13-25(3)(P). *Trujillo v. State*, 286 Ga. App. 438, 649 S.E.2d 573 (2007).

Heroin is a Schedule I drug. — Fatal variance between the allegations of the indictment and the evidence presented at defendant's trial for trafficking in heroin did not exist as the trial court was able to take judicial notice of the rules promulgated by the State Board of Pharmacy under the Administrative Procedures Act; pursuant to O.C.G.A. § 16-13-25(2)(J), heroin was a Schedule I drug. *Bailey v. State*, 259 Ga. App. 293, 576 S.E.2d 668 (2003).

Evidence insufficient to show constructive possession of piperazine. — Trial court erred in finding that the defendant violated the defendant's probation by committing the new felony of possessing a controlled substance, piperazine or TFMPP, in violation of O.C.G.A. § 16-13-30 because the circumstantial evidence was insufficient to show the defendant's constructive possession of the TFMPP pills; the only evidence linking the defendant to the drugs was spatial proximity, but it was at least equally likely that the pills belonged to the driver of the truck where the pills were found. *Scott v. State*, 305 Ga. App. 596, 699 S.E.2d 894 (2010).

State must prove THC was synthetically derived to sustain charge of possession or distribution. — Any substance which is a resin, compound, manufacture, salt, derivative mixture, or preparation of the cannabis plant shall be treated as marijuana, even though it may contain a high percentage of tetrahydrocannabinols (THC). For the state to sustain a charge of possession or distribution of THC under O.C.G.A. § 16-13-25(3)(P)(i), it must prove that the THC is not a compound, derivative, or preparation of the cannabis plant; that is, it must prove that the THC is synthetically derived. *Aycock v. State*, 146 Ga. App. 489, 246 S.E.2d 489 (1978).

Indictment charging defendant with selling "phenylcyclohexyl ethylamine" instead of "1-phenylcyclo-

hexyl ethylamine," was sufficient because it did not misinform defendant as to offense charged in such manner that it either impaired defendant's ability to prepare a defense, or surprised defendant at trial, and defendant could not be subjected to a subsequent prosecution for same offense. *Murray v. State*, 157 Ga. App. 596, 278 S.E.2d 2 (1981).

Entrapment. — Fact that a government informer furnished the contraband to a defendant does not constitute entrapment. *Venable v. State*, 203 Ga. App. 517, 417 S.E.2d 347, cert. denied, 203 Ga. App. 908, 417 S.E.2d 347 (1992).

Evidence does not demand finding of entrapment. — Fact that the defendant may have wished to "get in good" with the female undercover agent and that, without any undue encouragement on the agent's part, the defendant believed the informant's statement that the defendant could accomplish that by providing the agent with marijuana, this would not demand a finding of entrapment. *Venable v. State*, 203 Ga. App. 517, 417 S.E.2d 347, cert. denied, 203 Ga. App. 908, 417 S.E.2d 347 (1992).

Evidence insufficient for finding of possession of marijuana. — Defendant's conviction for possession of marijuana had to fail because in the absence of conclusive, scientific tests, the possibility remained that the substance at issue was not marijuana. *Chambers v. State*, 260 Ga. App. 48, 579 S.E.2d 71 (2003).

Sufficient evidence to support conviction for possession of MDMA. — Because the defendant's admission to possessing MDMA was direct evidence supporting guilt, and the admission served as a direct connection to the contraband, the trial court did not err in denying the defendant's motion for a new trial based on the insufficiency of the evidence. *Barrino v. State*, 282 Ga. App. 496, 639 S.E.2d 489 (2006).

Sufficient evidence to support conviction for trafficking MDMA. — With regard to a defendant's convictions for possession of marijuana with the intent to distribute, trafficking in 4-Methylenedioxymethamphetamine, commonly known as ecstasy, trafficking in cocaine, and possession of a firearm during the commis-

sion of a crime, there was sufficient evidence to support the defendant's conviction for possession of the contraband, which was found in a backpack, based on the strong odor of marijuana coming from the vehicle in which the defendant was a passenger in, the defendant's suspicious and nervous behavior, the defendant's joint living arrangement with two other defendants, the defendant's possession of ammunition for another one of the defendant's weapons, and the fact that the defendant was, at times, within arm's reach of the backpack, which showed an intent and power to exercise joint control over the backpack and the drugs found therein; likewise, there was sufficient evidence to support the trafficking charges based on the amounts of the contraband found; and, there was sufficient evidence to support the firearm possession charge since the defendant was found in possession of a magazine that fit

the gun located within arm's reach. However, considering that there were four people in the vehicle, the court found that the state's evidence was insufficient to exclude the reasonable hypothesis that the marijuana was intended for personal use, therefore, the conviction for the intent to distribute marijuana was reduced to possession. *Vines v. State*, 296 Ga. App. 543, 675 S.E.2d 260 (2009).

Cited in *Weaver v. State*, 145 Ga. App. 194, 243 S.E.2d 560 (1978); *Plemons v. State*, 155 Ga. App. 447, 270 S.E.2d 836 (1980); *Little v. State*, 157 Ga. App. 462, 278 S.E.2d 17 (1981); *Bennett v. State*, 158 Ga. App. 421, 280 S.E.2d 429 (1981); *Hartley v. State*, 159 Ga. App. 157, 282 S.E.2d 684 (1981); *Smith v. State*, 297 Ga. App. 526, 677 S.E.2d 717 (2009); *Proctor v. State*, 298 Ga. App. 388, 680 S.E.2d 493 (2009); *Thomas v. State*, 306 Ga. App. 279, 701 S.E.2d 895 (2010).

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Drugs and Controlled Substances, § 8.

C.J.S. — 28 C.J.S., Drugs and Narcotics, §§ 219, 286, 287.

U.L.A. — Uniform Controlled Substances Act (U.L.A.) § 204.

ALR. — Federal prosecutions based on manufacture, importation, transportation, possession, sale, or use of LSD, 22 ALR3d 1325.

Free exercise of religion as defense to

prosecution for narcotic or psychedelic drug offense, 35 ALR3d 939.

Marijuana, psilocybin, peyote, or similar drugs of vegetable origin as narcotics for purposes of drug prosecutions, 50 ALR3d 1164.

LSD, STP, MDA, or other chemically synthesized hallucinogenic or psychedelic substances as narcotics for purposes of drug prosecution, 50 ALR3d 1284.

16-13-26. Schedule II.

The controlled substances listed in this Code section are included in Schedule II:

(1) Any of the following substances, or salts thereof, except those narcotic drugs specifically exempted or listed in other schedules, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by combination of extraction and chemical synthesis:

(A) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate, excluding naloxone hydrochloride, but including the following:

- (i) Raw opium;
- (ii) Opium extracts;
- (iii) Opium fluid extracts;
- (iv) Powdered opium;
- (v) Granulated opium;
- (vi) Tincture of opium;
- (vii) Codeine;
- (viii) Ethylmorphine;
- (ix) Hydrocodone;
- (x) Hydromorphone;
- (xi) Metopon;
- (xii) Morphine;
- (xiii) Oripavine;
- (xiv) Oxycodone;
- (xv) Oxymorphone;
- (xvi) Thebaine;

(B) Any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in subparagraph (A) of this paragraph, except that these substances shall not include the isoquinoline alkaloids of opium;

(C) Opium poppy and poppy straw;

(D) Cocaine, coca leaves, any salt, compound, derivative, stereoisomers of cocaine, or preparation of coca leaves, and any salt, compound, derivative, stereoisomers of cocaine, or preparation thereof which is chemically equivalent or identical with any of these substances, but not including decocainized coca leaves or extractions which do not contain cocaine or ecgonine;

(2) Any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, whenever the existence of these isomers, esters, ethers, and salts is possible within the specific chemical designation:

- (A) Alfentanil;
- (A.1) Alphaprodine;
- (B) Anileridine;

- (C) Bezitramide;
- (D) Dihydrocodeine;
- (E) Diphenoxylate;
- (F) Fentanyl;
- (G) Isomethadone;
- (G.5) Levo-alphaacetylmethadol (some other names: levo-methadyl acetate, LAAM);
- (H) Levomethorphan;
- (I) Levorphanol;
- (J) Methazocine;
- (K) Methadone;
- (L) Methadone-Intermediate, 4-cyano-2-dimethylamino-4, 4-diphenyl butane;
- (M) Moramide-Intermediate, 2-methyl-3-morpholino-1, 1-diphenylpropane-carboxylic acid;
- (N) Pethidine (meperidine);
- (O) Pethidine-Intermediate-A, 4-cyano-1-methyl-4-phenylpiperidine;
- (P) Pethidine-Intermediate-B, ethyl-4-phenylpiperidine-4-carboxylate;
- (Q) Pethidine-Intermediate-C, 1-methyl-4-phenylpiperidine-4-carboxylic acid;
- (R) Phenazocine;
- (S) Piminodine;
- (T) Racemethorphan;
- (U) Racemorphan;
- (U.1) Remifentanil;
- (V) Sufentanil;
- (V.1) Tapentadol;
- (W) 4-anilino-N-phenethyl-4-piperidine (ANPP);

(3) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances included as having a stimulant effect on the central nervous system:

(A) Amphetamine, its salts, optical isomers, and salts of its optical isomers;

(B) Any substance which contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers;

(C) Phenmetrazine and its salts;

(D) Methylphenidate, including its salts, isomers, and salts of isomers;

(E) Carfentanil;

(F) Nabilone;

(G) Lisdexamphetamine;

(4) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any of the following substances included as having a depressant effect on the central nervous system, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(A) Amobarbital;

(A.5) Glutethimide;

(B) Secobarbital;

(C) Pentobarbital. (Code 1933, § 79A-807, enacted by Ga. L. 1974, p. 221, § 1; Ga. L. 1977, p. 625, § 7; Ga. L. 1978, p. 1668, § 7; Ga. L. 1979, p. 859, §§ 6, 7; Ga. L. 1980, p. 1746, § 5; Ga. L. 1982, p. 2403, §§ 12, 17, 17.1; Ga. L. 1985, p. 1219, § 3; Ga. L. 1987, p. 261, §§ 2-4; Ga. L. 1988, p. 420, § 1; Ga. L. 1989, p. 233, § 2; Ga. L. 1992, p. 1131, § 2; Ga. L. 1994, p. 169, § 4; Ga. L. 1997, p. 1311, § 1; Ga. L. 2000, p. 1317, § 1; Ga. L. 2007, p. 605, § 1/HB 286; Ga. L. 2008, p. 169, § 3/HB 1090; Ga. L. 2009, p. 126, § 1/HB 368; Ga. L. 2010, p. 860, § 2/SB 353.)

The 2009 amendment, effective April 21, 2009, in subparagraph (1)(A), added subdivision (1)(A)(xiii) and redesignated former subdivisions (1)(A)(xiii) through (1)(A)(xv) as present subdivisions (1)(A)(xiv) through (1)(A)(xvi), respectively; added subparagraph (2)(W); and, in subparagraph (3)(D), added “, including its salts, isomers, and salts of isomers” at the end.

The 2010 amendment, effective June 3, 2010, added subparagraph (2)(V.1).

Administrative rules and regula-

tions. — Registration requirements under Georgia Controlled Substances Act, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Georgia State Board of Pharmacy, Chapter 480-20. Requirements of a prescription drug order, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Georgia State Board of Pharmacy, Chapter 480-22.

Law reviews. — For survey article on criminal law and procedure, see 34 Mercer L. Rev. 89 (1982).

For note on airport searches of drug couriers, see 33 Mercer L. Rev. 433 (1981).

JUDICIAL DECISIONS

Construed with O.C.G.A. §§ 16-13-30 and 16-13-31. — When the total weight of the substances seized from defendant was only 24.4 grams of cocaine, defendant argued that the only Georgia statute that proscribes possession of cocaine is O.C.G.A. § 16-13-31, prohibiting possession of 28 grams or more of cocaine. However, although O.C.G.A. § 16-13-31 deals with being in knowing, actual possession of 28 grams or more of cocaine or any mixture containing cocaine, O.C.G.A. § 16-13-26(1)(D) (prior to 1988 amendment inserting "cocaine") lists "Coca leaves, any salt, compound, derivative, stereoisomers of cocaine, or preparation of coca leaves, and any salt, compound, derivative, stereoisomers of cocaine, ..." which includes cocaine. Under O.C.G.A. § 16-13-30, the unlawful possession of any controlled substance, regardless of amount, constitutes an offense. *Dixon v. State*, 180 Ga. App. 222, 348 S.E.2d 742 (1986) (decided prior to 1988 amendment inserting "cocaine" at the beginning of paragraph 1)(D)).

Methylphenidate possessor's ex post facto argument rejected. — Methylphenidate has been a Schedule II controlled substance since 1974. Accordingly, the contention that defendant was sentenced for an ex post facto crime has no merit where defendant's arrest warrant stated the date of possession of methylphenidate to have been on or about July 25, 1985. *Carter v. State*, 180 Ga. App. 173, 348 S.E.2d 715 (1986).

Simultaneous possession of different proscribed drugs may result in multiple punishments. *Howard v. State*, 144 Ga. App. 208, 240 S.E.2d 908 (1977).

Multiple offenses arising from simultaneous possession of drugs of same category. — Multiple offenses can be charged when drugs of same category (i.e., Schedule II) are taken from one person at same time and place. *Howard v. State*, 144 Ga. App. 208, 240 S.E.2d 908 (1977).

Defendant may be prosecuted, con-

victed, and separately sentenced for the simultaneous possession of each of the controlled substances listed in O.C.G.A. § 16-13-26. *Tabb v. State*, 250 Ga. 317, 297 S.E.2d 227 (1982).

Controlled substance. — Cocaine was a controlled substance pursuant to O.C.G.A. § 16-13-26(1)(D), and thus defendant could be convicted both for selling a controlled substance and distributing a controlled substance within 1,000 feet of a housing project after defendant sold cocaine to an undercover informant. *Dixon v. State*, 252 Ga. App. 385, 556 S.E.2d 480 (2001).

Sufficient evidence supported defendant's conviction of possession of cocaine under O.C.G.A. § 16-13-30(a) as: (1) the informant testified that defendant procured crack cocaine for the informant for \$300.00; (2) detectives witnessed defendant enter and exit the bar where, according to the informant, defendant obtained the cocaine; and (3) the substance tested positive for cocaine, a controlled substance under O.C.G.A. § 16-13-26(1)(D); the credibility of the informant, which, according to the defendant, was allegedly impaired by the informant's prior criminal conduct, was an issue for the jury. *Ross v. State*, 275 Ga. App. 137, 619 S.E.2d 809 (2005).

Prior out-of-state drug convictions used to impose recidivist sentence. — Defense counsel was not ineffective for failing to object to the trial court's use of prior felonies defendant committed in California to sentence the defendant as a recidivist under O.C.G.A. § 17-10-7(c) as the elements of Cal. Health & Safety Code §§ 11054(f) and 11350(a) (possession of cocaine) were sufficiently similar to those of O.C.G.A. §§ 16-13-26(1)(D) and 16-13-30(c); and the elements of Cal. Penal. Code § 211 (robbery) were sufficiently similar to those of O.C.G.A. § 16-8-40. *Williams v. State*, 296 Ga. App. 270, 674 S.E.2d 115 (2009).

Cited in *Nix v. State*, 135 Ga. App. 672, 219 S.E.2d 6 (1975); *Partain v. State*, 139

Ga. App. 325, 228 S.E.2d 292 (1976); Cole v. State, 142 Ga. App. 461, 236 S.E.2d 125 (1977); Elrod v. State, 143 Ga. App. 331, 238 S.E.2d 291 (1977); Hughes v. State, 150 Ga. App. 90, 256 S.E.2d 634 (1979); Robinson v. State, 244 Ga. 15, 257 S.E.2d 523 (1979); Crosby v. State, 150 Ga. App. 804, 258 S.E.2d 593 (1979); Rick v. State, 152 Ga. App. 519, 263 S.E.2d 213 (1979); Farmer v. State, 154 Ga. App. 673, 270 S.E.2d 26 (1980); Plemons v. State, 155 Ga. App. 447, 270 S.E.2d 836 (1980); Wood v. State, 156 Ga. App. 810, 275 S.E.2d 694 (1980); Tant v. State, 247 Ga. 264, 275 S.E.2d 312 (1981); Little v. State, 157 Ga. App. 462, 278 S.E.2d 17 (1981); Ward v. State, 248 Ga. 60, 281 S.E.2d 503 (1981); Hartley v. State, 159 Ga. App. 157, 282 S.E.2d 684 (1981); Head v. State, 160 Ga. App. 4, 285 S.E.2d 735 (1981); Reece v. State, 160 Ga. App. 59, 286 S.E.2d 41 (1981); Boyer v. State, 178 Ga. App. 372,

343 S.E.2d 146 (1986); Santone v. State, 187 Ga. App. 789, 371 S.E.2d 428 (1988); Helmecei v. State, 230 Ga. App. 866, 498 S.E.2d 326 (1998); Davis v. State, 232 Ga. App. 882, 502 S.E.2d 779 (1998); Daniels v. State, 244 Ga. App. 522, 536 S.E.2d 206 (2000); Salgado v. State, 268 Ga. App. 18, 601 S.E.2d 417 (2004); Thomas v. State, 287 Ga. App. 500, 651 S.E.2d 801 (2007); Kohlmeier v. State, 289 Ga. App. 709, 658 S.E.2d 261 (2008); Womble v. State, 290 Ga. App. 768, 660 S.E.2d 848 (2008); Howard v. State, 291 Ga. App. 289, 661 S.E.2d 644 (2008); Thomas v. State, 291 Ga. App. 795, 662 S.E.2d 849 (2008); Kessinger v. State, 298 Ga. App. 479, 680 S.E.2d 546 (2009); Williamson v. State, 300 Ga. App. 538, 685 S.E.2d 784 (2009); Coe v. Carroll & Carroll, Inc., No. A10A2338, 2011 Ga. App. LEXIS 280 (Mar. 25, 2011).

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Drugs and Controlled Substances, § 8.

C.J.S. — 28 C.J.S., Drugs and Narcotics, § 219.

U.L.A. — Uniform Controlled Substances Act (U.L.A.) § 206.

16-13-27. Schedule III.

The controlled substances listed in this Code section are included in Schedule III:

(1) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances, included as having a stimulant effect on the central nervous system, including its salts, isomers (whether optical, position, or geometric), and salts of such isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(A) Those compounds, mixtures, or preparations in dosage unit forms containing any stimulant substances which are listed as excepted compounds by the State Board of Pharmacy pursuant to this article, and any other drug of quantitative composition so excepted or which is the same except that it contains a lesser quantity of controlled substances;

(B) Benzphetamine;

(C) Chlorphentermine;

(D) Clortermine;

(E) Phendimetrazine;

(2) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances included as having a depressant effect on the central nervous system:

(A) Any compound, mixture, or preparation containing amobarbital, secobarbital, pentobarbital, or any salts thereof and one or more active medicinal ingredients which are not listed in any schedule;

(B) Any suppository dosage form containing amobarbital, secobarbital, pentobarbital, or any salt of any of these drugs and approved by the State Board of Pharmacy for marketing only as a suppository;

(C) Any substance which contains any quantity of a derivative of barbituric acid or any salt thereof;

(D) Chlorhexadol;

(E) Reserved;

(F) Lysergic acid;

(G) Lysergic acid amide;

(H) Methypylon;

(I) Sulfondiethylmethane;

(J) Sulfonethylmethane;

(K) Sulfonmethane;

(L) Tiletamine/Zolazepam (Telazol);

(3) Nalorphine;

(4) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing limited quantities of the following narcotic drugs, or any salts thereof:

(A) Not more than 1.8 grams of codeine, or any of its salts, per 100 milliliters or not more than 90 milligrams per dosage unit, with an equal or greater quantity of an isoquinoline alkaloid of opium;

(B) Not more than 1.8 grams of codeine, or any of its salts, per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(C) Not more than 300 milligrams of dihydrocodeinone (hydrocodone), or any of its salts, per 100 milliliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium;

(D) Not more than 300 milligrams of dihydrocodeinone (hydrocodone), or any of its salts, per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(E) Not more than 1.8 grams of dihydrocodeine, or any of its salts, per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(F) Not more than 300 milligrams of ethylmorphine, or any of its salts, per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(G) Not more than 500 milligrams of opium per 100 milliliters or per 100 grams, or not more than 25 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(H) Not more than 50 milligrams of morphine, or any of its salts, per 100 milliliters or per 100 grams with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(5) The State Board of Pharmacy may except by rule any compound, mixture, or preparation containing any stimulant or depressant substance listed in paragraphs (1) and (2) of this Code section from the application of all or any part of this article if the compound, mixture, or preparation contains one or more active, medicinal ingredients not having a stimulant or depressant effect on the central nervous system, and if the admixtures are included therein in combinations, quantity, proportion, or concentration that vitiate the potential for abuse of the substances which have a stimulant or depressant effect on the central nervous system;

(6) Any anabolic steroid or any salt, ester, or isomer of a drug or substance described or listed in this paragraph, if that salt, ester, or isomer promotes muscle growth. Such term does not include an anabolic steroid which is expressly intended for administration through implants to cattle or other nonhuman species and which has been approved by the secretary of health and human services for such administration:

(A) Boldenone;

- (A.5) Boldione (Androsta-1,4-diene-3,17-dione);
- (B) Chlorotestosterone;
- (C) Clostebol;
- (D) Dehydrochlormethyltestosterone;
- (D.1) Desoxymethyltestosterone (17a-methyl-5a-androst-2-en-17-ol, madol);
- (E) Dihydrotestosterone;
- (F) Drostanolone;
- (G) Ethylestrenol;
- (H) Fluoxymesterone;
- (I) Formebolone;
- (J) Mesterolone;
- (K) Methandienone;
- (L) Methandranone;
- (M) Methandriol;
- (N) Methandrostenolone;
- (O) Methenolone;
- (P) Methyltestosterone;
- (Q) Mibolerone;
- (R) Nandrolone;
- (S) Norethandrolone;
- (T) Oxandrolone;
- (U) Oxymesterone;
- (V) Oxymetholone;
- (W) Stanolone;
- (X) Stanozolol;
- (Y) Testolactone;
- (Z) Testosterone;
- (AA) Trenbolone;
- (BB) 19-nor-4,9(10)-androstadienedione (estra-4,9(10)-diene-3,17-dione);

(7) Ketamine;

(8) Dronabinol (synthetic) in sesame oil and encapsulated in a U.S. Food and Drug Administration approved drug product also known as Marinol;

(9) Sodium oxybate, when the FDA approved form of this drug is in a container labeled in compliance with subsection (a) or (b) of Code Section 26-3-8, in the possession of a registrant permitted to dispense the drug, or in the possession of a person to whom it has been lawfully prescribed;

(10) Buprenorphine;

(11) Embutramide;

(12) Any drug product in hard or soft gelatin capsule form containing natural dronabinol (derived from the cannabis plant) or synthetic dronabinol (produced from synthetic materials) in sesame oil, for which an abbreviated new drug application (ANDA) has been approved by the FDA under section 505(j) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(j)) which references as its listed drug the drug product referred to in paragraph (8) of this Code section. (Code 1933, § 79A-808, enacted by Ga. L. 1974, p. 221, § 1; Ga. L. 1978, p. 1668, § 8; Ga. L. 1980, p. 1746, § 6; Ga. L. 1982, p. 3, § 16; Ga. L. 1982, p. 2403, §§ 13, 18; Ga. L. 1989, p. 233, § 3; Ga. L. 1991, p. 312, § 1; Ga. L. 1992, p. 6, § 16; Ga. L. 1992, p. 1131, §§ 3, 4; Ga. L. 1996, p. 356, § 2; Ga. L. 1997, p. 1311, § 2; Ga. L. 1998, p. 778, § 1; Ga. L. 2000, p. 1317, § 2; Ga. L. 2003, p. 349, § 3; Ga. L. 2008, p. 169, § 4/HB 1090; Ga. L. 2009, p. 126, § 2/HB 368; Ga. L. 2011, p. 656, §§ 3, 4/SB 93.)

The 2009 amendment, effective April 21, 2009, added subparagraphs (6)(A.5), (6)(D.1), and (6)(BB).

The 2011 amendment, effective May 13, 2011, substituted "Tiletamine/Zolazepam" for "Tiletamine/Zolozepam" in subparagraph (2)(L); substituted a semicolon for a period at the end of paragraph (11); and added paragraph (12).

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, a semicolon was substituted for a period at the end of subparagraph (4)(H), at the end of para-

graph (5), and at the end of subparagraph (6)(AA).

Administrative rules and regulations. — Registration requirements under Georgia Controlled Substances Act, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Georgia State Board of Pharmacy, Chapter 480-20. Requirements of a prescription drug order, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Georgia State Board of Pharmacy, Chapter 480-22.

JUDICIAL DECISIONS

Cited in *Williamson v. State*, 134 Ga. App. 864, 216 S.E.2d 684 (1975); *Nix v. State*, 135 Ga. App. 672, 219 S.E.2d 6 (1975); *Cadle v. State*, 136 Ga. App. 232,

221 S.E.2d 59 (1975); *Chesser v. State*, 141 Ga. App. 657, 234 S.E.2d 121 (1977); *Taylor v. State*, 144 Ga. App. 534, 241 S.E.2d 590 (1978); *Taylor v. State*, 149 Ga. App.

362, 254 S.E.2d 432 (1979); Robinson v. State, 244 Ga. 15, 257 S.E.2d 523 (1979); Little v. State, 157 Ga. App. 462, 278 S.E.2d 17 (1981); Printup v. State, 159 Ga. App. 574, 284 S.E.2d 82 (1981); Sosebee v. State, 282 Ga. App. 905, 640 S.E.2d 379 (2006).

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Drugs and Controlled Substances, § 8.

U.L.A. — Uniform Controlled Substances Act (U.L.A.) § 208.

C.J.S. — 28 C.J.S., Drugs and Narcotics, §§ 69, 70, 211, 212, 219.

16-13-27.1. Exempt anabolic steroids.

The following anabolic steroid containing compounds, mixtures, or preparations have been exempted as Schedule III Controlled Substances by the United States Drug Enforcement Administration, as listed in 21 C.F.R. 1308.34, and are therefore exempted from paragraph (6) of Code Section 16-13-27:

TABLE OF EXEMPT ANABOLIC STEROID PRODUCTS

<u>Trade Name</u>	<u>Company</u>
Androgen LA	Forest Pharmaceuticals St. Louis, MO
Andro-Estro 90-4	Rugby Labs Rockville Centre, NY
depANDROGYN	Forest Pharmaceuticals St. Louis, MO
DEPO-T.E.	Quality Research Pharm Carmel, IN
depTESTROGEN	Maroca Pharm Phoenix, AZ
Duomone	Winitec Pharm Pacific, MO
DURATESTRIN	W. E. Hauck Alpharetta, GA
DUO-SPAN II	Premedics Labs Gardena, CA
Estratest	Solvay Pharmaceuticals Marietta, GA
Estratest HS	Solvay Pharmaceuticals Marietta, GA

PAN ESTRA TEST	Pan American Labs Covington, LA
Premarin 1.25mg with Methyltestosterone	Ayerst Labs, Inc. New York, NY
Premarin 0.625mg with Methyltestosterone	Ayerst Labs, Inc. New York, NY
TEST-ESTRO Cypionates	Rugby Labs Rockville Centre, NY
Testosterone Cyp 50 Estradiol Cyp 2	I.D.E. Interstate Amityville, NY
Testosterone Cypionate-Estradiol Cypionate Injection	Best Generics N. Miami Beach, FL
Testosterone Cypionate-Estradiol Cypionate Injection	Schein Pharm Port Washington, NY
Testosterone Cypionate-Estradiol Cypionate Injection	Steris Labs, Inc. Phoenix, AZ
Testosterone Cypionate-Estradiol Valerate Injection	Schein Pharm Port Washington, NY
Testosterone Enanthate-Estradiol Valerate Injection	Steris Labs, Inc. Phoenix, AZ

(Code 1981, § 16-13-27.1, enacted by Ga. L. 1993, p. 590, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1993, “St.” was substituted for “St” in two places in the

“Company” column entries corresponding to the “Trade Name” column entries: “Androgen LA” and “depANDROGYN.”

JUDICIAL DECISIONS

Cited in American Ass’n of Cab Cos. v. Olukoya, 233 Ga. App. 731, 505 S.E.2d 761 (1998).

16-13-28. Schedule IV.

(a) The controlled substances listed in this Code section are included in Schedule IV. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specified chemical designation, included as having a stimulant or depressant effect on the central nervous system or a hallucinogenic effect:

- (1) Alprazolam;
- (1.5) Armodafinil;
- (2) Barbitol;
- (2.1) Bromazepam;
- (2.15) Butorphanol;
- (2.2) Camazepam;
- (2.25) Carisoprodol;
- (2.3) Cathine;
- (3) Chloral betaine;
- (4) Chloral hydrate;
- (5) Chlordiazepoxide, but not including librax (chlordiazepoxide hydrochloride and clidinium bromide) or menrium (chlordiazepoxide and water soluble esterified estrogens);
- (5.1) Clobazam;
- (6) Clonazepam;
- (7) Clorazepate;
- (7.1) Clotiazepam;
- (7.2) Cloxazolam;
- (7.3) Delorazepam;
- (8) Desmethyldiazepam;
- (8.5) Dexfenfluramine;
- (9) Reserved;
- (10) Diazepam;
- (11) Diethylpropion;
- (11.05) Difenoxin;
- (11.1) Estazolam;
- (12) Ethchlorvynol;
- (13) Ethinamate;
- (13.1) Ethyl loflazepate;
- (13.2) Fencamfamin;
- (14) Fenfluramine;

- (14.1) Flunitrazepam;
- (14.2) Fenproporex;
- (15) Flurazepam;
- (15.3) Fospropofol;
- (16) Halazepam;
- (16.1) Haloxazolam;
- (16.15) Indiplon;
- (16.2) Ketazolam;
- (16.3) Lometazepam;
- (16.4) Loprazolam;
- (17) Lorazepam;
- (18) Mazindol;
- (19) Mebutamate;
- (19.1) Medazepam;
- (19.2) Mefenorex;
- (20) Meprobamate;
- (21) Methohexital;
- (22) Methylphenobarbital;
- (22.1) Midazolam;
- (22.15) Modafinil;
- (22.2) Nimetazepam;
- (22.3) Nitrazepam;
- (22.4) Nordiazepam;
- (23) Oxazepam;
- (23.1) Oxazolam;
- (24) Paraldehyde;
- (25) Pemoline;
- (26) Pentazocine;
- (27) Petrichloral;
- (28) Phenobarbital;
- (29) Phentermine;

- (29.1) Pipradrol;
- (30) Prazepam;
- (30.03) Propofol;
- (30.05) Propoxyphene (including all salts and optical isomers);
- (30.1) Quazepam;
- (30.2) Sibutramine;
- (30.3) SPA (-)-1-dimethylamino-1, 2-diphenylethane;
- (31) Temazepam;
- (32) Triazolam;
- (32.5) Zaleplon;
- (33) Zolpidem;
- (34) Zopiclone.

(b) The State Board of Pharmacy may except by rule any compound, mixture, or preparation containing any depressant, stimulant, or hallucinogenic substance listed in subsection (a) of this Code section from the application of all or any part of this article if the compound, mixture, or preparation contains one or more active, medicinal ingredients not having a depressant or stimulant effect on the central nervous system, and if the admixtures are included therein in combinations, quantity, proportion, or concentration that vitiate the potential for abuse of the substances which have a depressant or stimulant effect on the central nervous system. (Code 1933, § 79A-809, enacted by Ga. L. 1974, p. 221, § 1; Ga. L. 1977, p. 1287, § 1; Ga. L. 1979, p. 859, § 8; Ga. L. 1980, p. 1746, § 7; Ga. L. 1981, p. 557, § 4; Ga. L. 1982, p. 3, § 16; Ga. L. 1982, p. 2403, §§ 14, 19; Ga. L. 1984, p. 22, § 16; Ga. L. 1985, p. 1219, § 4; Ga. L. 1986, p. 10, § 16; Ga. L. 1986, p. 1555, § 4; Ga. L. 1987, p. 261, § 5; Ga. L. 1989, p. 233, § 4; Ga. L. 1990, p. 8, § 16; Ga. L. 1993, p. 590, § 2; Ga. L. 1994, p. 169, § 5; Ga. L. 1996, p. 1023, § 1; Ga. L. 1997, p. 1311, § 3; Ga. L. 1998, p. 778, § 2; Ga. L. 1999, p. 643, § 1; Ga. L. 2000, p. 1317, § 3; Ga. L. 2003, p. 349, § 4; Ga. L. 2006, p. 219, § 2/HB 1054; Ga. L. 2007, p. 47, § 16/SB 103; Ga. L. 2008, p. 169, § 5/HB 1090; Ga. L. 2009, p. 126, §§ 3, 4/HB 368; Ga. L. 2010, p. 860, § 3/SB 353; Ga. L. 2011, p. 656, § 5/SB 93.)

The 2009 amendment, effective April 21, 2009, deleted paragraph (a)(11.5), which read “Eszopiclone;” and added paragraph (a)(16.15).

The 2010 amendment, effective June 3, 2010, added paragraph (a)(15.3).

The 2011 amendment, effective May 13, 2011, added paragraph (a)(30.03).

Code Commission notes.— Pursuant to Code Section 28-9-5, in 1998, the new paragraph added in 1998 was redesignated as paragraph (a)(30.2), and former

paragraph (a)(30.2) was redesignated as paragraph (a)(30.3).

Administrative rules and regulations. — Registration requirements under the Georgia Controlled Substances Act, Official Compilation of the Rules and Regulations of the State of Georgia, Rules

of Georgia State Board of Pharmacy, Chapter 480-20. Requirements of a prescription drug order, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Georgia State Board of Pharmacy, Chapter 480-22.

JUDICIAL DECISIONS

Constitutionality. — Former Code 1933, § 79A-809 was not unconstitutional as violative of Ga. Const. 1976, Art. I, Sec. II, Para. IV, and Art. III, Sec. I, Para. I (see now Ga. Const. 1983, Art. I, Sec. II, Para. III, and Art. III, Sec. I, Para. I), which sections deal with separation of powers and delegations of legislative power respectively. *Harmon v. State*, 235 Ga. 329, 219 S.E.2d 441 (1975) (see O.C.G.A. § 16-13-28).

Identification of drug. — Mere proof of a trade name of a controlled substance is insufficient evidence to sustain a conviction under the Controlled Substances Act, O.C.G.A. § 16-13-20 et seq.; however, circumstantial evidence was sufficient to authorize the jury's determination that

Darvocet N-100 tablets defendant fraudulently obtained were the controlled substance dextropropoxyphene as alleged in the indictment. *Hulsey v. State*, 220 Ga. App. 64, 467 S.E.2d 610 (1996).

Cited in *Little v. State*, 157 Ga. App. 462, 278 S.E.2d 17 (1981); *Ward v. State*, 248 Ga. 60, 281 S.E.2d 503 (1981); *Castillo v. State*, 166 Ga. App. 817, 305 S.E.2d 629 (1983); *Davis v. State*, 232 Ga. App. 882, 502 S.E.2d 779 (1998); *Williams v. State*, 279 Ga. App. 83, 630 S.E.2d 601 (2006); *State v. Pando*, 284 Ga. App. 70, 643 S.E.2d 342 (2007); *Noellien v. State*, 298 Ga. App. 47, 679 S.E.2d 75 (2009); *Torres v. State*, 298 Ga. App. 158, 679 S.E.2d 757 (2009).

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Drugs and Controlled Substances, § 8.

C.J.S. — 28 C.J.S., Drugs and Narcotics, §§ 69, 70, 211, 212, 219.

U.L.A. — Uniform Controlled Substances Act (U.L.A.) § 210.

16-13-29. Schedule V.

The controlled substances listed in this Code section are included in Schedule V:

(1) Any compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs, or salts thereof, which also contains one or more nonnarcotic, active, medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the narcotic drug alone:

(A) Not more than 200 milligrams of codeine, or any of its salts, per 100 milliliters or per 100 grams;

(B) Not more than 100 milligrams of dihydrocodeine, or any of its salts, per 100 milliliters or per 100 grams;

(C) Not more than 100 milligrams of ethylmorphine, or any of its salts, per 100 milliliters or per 100 grams;

(D) Not more than 2.5 milligrams of diphenoxylate and not less than 25 micrograms of atropine sulfate per dosage unit;

(E) Not more than 100 milligrams of opium per 100 milliliters or per 100 grams;

(2) Lacosamide;

(3) Pregabalin;

(4) Pyrovalerone; or

(5) Pseudoephedrine as an exempt over-the-counter (OTC) Schedule V controlled substance distributed in the same manner as set forth in Code Section 16-13-29.2; provided, however, that such exemption shall take effect immediately and shall not require rulemaking by the State Board of Pharmacy; provided, further, that wholesale drug distributors located within this state and licensed by the State Board of Pharmacy and which are registered and regulated by the U.S. Drug Enforcement Administration (DEA) shall not be subject to any board requirements for controlled substances for the storage, reporting, recordkeeping, or physical security of drug products containing pseudoephedrine which are more stringent than those included in DEA regulations. (Code 1933, § 79A-810, enacted by Ga. L. 1974, p. 221, § 1; Ga. L. 1978, p. 1668, § 9; Ga. L. 1979, p. 859, § 9; Ga. L. 1980, p. 1746, § 8; Ga. L. 1981, p. 557, § 5; Ga. L. 1984, p. 1019, § 2; Ga. L. 1986, p. 1555, § 5; Ga. L. 1989, p. 233, § 5; Ga. L. 1993, p. 590, § 3; Ga. L. 2003, p. 349, § 5; Ga. L. 2007, p. 605, § 2/HB 286; Ga. L. 2010, p. 860, § 4/SB 353; Ga. L. 2011, p. 656, § 6/SB 93.)

The 2010 amendment, effective June 3, 2010, substituted the present provisions of paragraph (2) for the former provisions, which read: "Reserved".

The 2011 amendment, effective May 13, 2011, deleted "or" at the end of paragraph (3); substituted "; or" for a period at the end of paragraph (4); and added paragraph (5).

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2003, a semicolon was substituted for a period at the end of paragraph (2).

Administrative rules and regulations. — Registration requirements under Georgia Controlled Substances Act, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Georgia State Board of Pharmacy, Chapter 480-20. Requirements of a prescription drug order, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Georgia State Board of Pharmacy, Chapter 480-22.

JUDICIAL DECISIONS

Cited in Taylor v. State, 144 Ga. App. 534, 241 S.E.2d 590 (1978); Little v. State, 157 Ga. App. 462, 278 S.E.2d 17 (1981); Printup v. State, 159 Ga. App. 574, 284 S.E.2d 82 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Drugs and Controlled Substances, § 8.
C.J.S. — 28 C.J.S., Drugs and Narcotics, §§ 219, 286, 287.
U.L.A. — Uniform Controlled Substances Act (U.L.A.) § 212.

16-13-29.1. Nonnarcotic substances excluded from schedules of controlled substances.

The following nonnarcotic substances which may, under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301), be lawfully sold over the counter without a prescription, are excluded from all schedules of controlled substances under this article:

Trade name or designation (Dosage form)	Composition/Potency	Manufacturer or distributor
Amodrine (Tablet)	Phenobarbital/8.00 mg; Aminophylline/100.00 mg; Racephedrine/25.00 mg	Searle, G.D. & Co.
Amodrine E C (Enteric-coated tablet)	Phenobarbital/8.00 mg; Aminophylline/100.00 mg; Racephedrine/25.00 mg	Searle, G.D. & Co.
Anodyne (Ointment)	Chloral hydrate/0.69 g/30 g	Zemmer Co.
Anti-Asthma (Tablet)	Phenobarbital/8.00 mg; Theophylline/130.00 mg; Ephedrine hydrochloride/25.00 mg	Ormont Drug & Chem.
Anti-asthmatic (Tablet)	Phenobarbital/8.10 mg; Ephedrine hydrochloride/24.00 mg; Theophylline/130.00 mg	Zenith Labs., Inc.

Asma-Ese (Tablet)	Phenobarbital/8.10 mg; Theophylline/129.60 mg; Ephedrine hydrochloride/ 24.30 mg	Parmed Pharm.
Asma-Lief (Tablet)	Phenobarbital/8.10 mg; Ephedrine hydrochloride/ 24.30 mg; Theophylline/ 129.60 mg	Columbia Medical Co.
Asma-Lief Pediatric (Suspension)	Phenobarbital/4.00 mg/05 ml; Ephedrine hydrochloride/ 12.00 mg/05 ml; Theophylline/65.00 mg/05 ml	Columbia Medical Co.
Asma Tuss (Syrup)	Phenobarbital/4.00 mg/05 ml; Glyceryl guaiacolate/50.00 mg/05 ml; Chlorphentramine maleate/1.00 mg/05 ml; Ephedrine sulfate/12.00 mg/05 ml; Theophylline/ 15.00 mg/05 ml	Halsey Drug Co.
Azma-Aid (Tablet)	Phenobarbital/8.00 mg; Theophylline/129.60 mg Ephedrine hydrochloride/ 24.30 mg	Rondex Labs.
Azmadrine (Tablet)	Phenobarbital/8.00 mg; Ephedrine hydrochloride/ 24.00 mg; Theophylline/ 130.00 mg	U.S. Ethicals.
Benzedrex Inhaler (Inhaler)	Propylhexedrine	Smith Kline Consumer Products.
Bet-U-Lol (Liquid)	Chloral hydrate/0.54 g/30 ml; Methyl salicylate/ 30.10 g/30 ml; Menthol/ 0.69 g/30 ml	Huxley Pharm.
Bronkolixir	Phenobarbital/4.00 mg/05 ml;	Breon Labs.

(Elixir)	Theophylline/15.00 mg/05 ml; Ephedrine sulfate/12.00 mg/05 ml; Glyceryl guaiacolate/50.00 mg/05 ml	
Bronkotabs (Tablet)	Phenobarbital/8.00 mg; Theophylline/100.00 mg; Glyceryl guaiacolate/ 100.00 mg; Ephedrine sulfate/24.00 mg	Breon Labs.
Bronkotabs- Hafs (Tablet)	Phenobarbital/4.00 mg; Glyceryl guaiacolate/ 50.00 mg; Theophylline/ 50.00 mg; Ephedrine sulfate/12.00 mg	Breon Labs.
Ceepa (Tablet)	Phenobarbital/8.00 mg; Theophylline/130.00 mg; Ephedrine hydrochloride/ 24.00 mg	Geneva Drugs.
Chlorasal (Ointment)	Chloral hydrate/648.00 mg/30 g; Menthol/ 972.00 mg/30 g; Methyl salicylate/ 4.277 g/30 g	Wisconsin Pharmacal.
Choate's Leg Freeze (Liquid)	Chloral hydrate/7.40 g/30 ml; Ether/10.3 ml/30 ml; Menthol/6.3 g/30 ml; Camphor/8.7 g/30 ml	Bickmore, Inc.
Chloro- salicylate (Ointment)	Chloral hydrate/648.00 mg/30 g; Methyl salicylate/6.66 g/30 g; Menthol/1.13 g/30 g	Kremers- Urban Co.
Menthalgesic (Ointment)	Chloral hydrate/0.45 g/30 g; Menthol/0.45 g/30 g; Methyl salicylate/3.60 g/30 g; Camphor/0.45 g/30 g	Blue Line Chem Co.
Neoasma	Phenobarbital/10.00 mg;	Tarmac

(Tablet)	Theophylline/130.00 mg; Ephedrine hydrochloride/ 24.00 mg	Products.
P.E.C.T. (Tablet)	Phenobarbital/8.10 mg; Chlorpheniramine maleate/ 2.00 mg; Ephedrine sulfate/24.30 mg; Theophylline/129.60 mg	Halsom Drug Co.
Primatene (Tablet)	Phenobarbital/8.00 mg; Ephedrine hydrochloride/ 24.00 mg; Theophylline/ 130.00 mg	Whitehall Labs.
Rynal (Spray)	d1-methamphetamine hydrochloride/0.11 g/50 ml; Antipyrine/ 0.14 g/50 ml; Pyriamine maleate/0.005 g/50 ml; Hyamine 2389/0.01 g/50 ml	Blaine Co.
S-K Asthma (Tablet)	Phenobarbital/8.00 mg; Ephedrine hydrochloride/ 24.30 mg; Theophylline/ 129.60 mg	S-K Research Labs.
Tedral (Tablet)	Phenobarbital/8.00 mg; Theophylline/130.00 mg; Ephedrine hydrochloride/ 24.00 mg	Warner- Chilcott.
Tedral Anti H (Tablet)	Phenobarbital/8.00 mg; Chlorpheniramine maleate/ 2.00 mg; Theophylline/ 130.00 mg; Ephedrine hydrochloride/24.00 mg	Warner- Chilcott.
Tedral Antiasthmatic (Tablet)	Phenobarbital/8.00 mg; Theophylline/130.00 mg; Ephedrine hydrochloride/ 24.00 mg	Parke-Davis & Co.
Tedral Elixir (Elixir)	Phenobarbital/2.00 mg/05 ml; Ephedrine hydro-	Warner- Chilcott.

chloride/6.00 mg/05 ml;
Theophylline/32.50 mg/
05 ml

Tedral Pediatric (Suspension)	Phenobarbital/4.00 mg/05 ml; Ephedrine hydro- chloride/12.00 mg/05 ml; Theophylline/65.00 mg/05 ml	Warner- Chilcott.
Teephen (Tablet)	Phenobarbital/8.00 mg; Ephedrine hydrochloride/ 24.00 mg; Theophylline/ 130.00 mg	Robinson Labs.
Teephen Pediatric (Suspension)	Phenobarbital/4.00 mg/05 ml; Ephedrine hydro- chloride/12.00 mg/05 ml; Theophylline anhydrous/ 65.00 mg/05 ml	Robinson Labs.
TEP (Tablet)	Phenobarbital/8.00 mg; Theophylline/130.00 mg; Ephedrine hydrochloride/ 24.00 mg	Towne, Paulsen & Co., Inc.
T.E.P. Compound (Tablet)	Phenobarbital/8.10 mg; Theophylline/129.60 mg; Ephedrine hydrochloride/ 24.30 mg	Stanlabs, Inc.
Thedrizem (Tablet)	Phenobarbital/8.00 mg; Ephedrine hydrochloride/ 25.00 mg; Theophylline/ 100.00 mg	Zemmer Co.
Theobal (Tablet)	Phenobarbital/8.00 mg; Ephedrine hydrochloride/ 24.00 mg; Theophylline/ 130.00 mg	Halsey Drug Co.
Val-Tep (Tablet)	Phenobarbital/8.00 mg; Ephedrine hydrochloride/ 24.00 mg; Theophylline/ 130.00 mg	Vale Chemical Co.

Verequad (Suspension)	Phenobarbital/4.00 mg/05 ml; Ephedrine hydrochloride/ 12.00 mg/05 ml; Theophylline calcium salicylate/65.00 mg/05 ml; Glyceryl guaiacolate/ 50.00 mg/05 ml	Knoll Pharm.
Verequad (Tablet)	Phenobarbital/8.00 mg; Ephedrine hydrochloride/ 24.00 mg; Glyceryl guaiacolate/100.00 mg; Theophylline calcium salicylate/130.00 mg	Knoll Pharm.
Vicks Inhaler (Inhaler)	1-Desoxyephedrine/113.00 mg	Vick Chemical Co.

(Code 1981, § 16-13-29.1, enacted by Ga. L. 1983, p. 349, § 1; Ga. L. 1989, p. 233, § 6; Ga. L. 1990, p. 8, § 16.)

16-13-29.2. Authority for exemption of over-the-counter Schedule V controlled substances.

The State Board of Pharmacy shall have the authority to exempt and control the sale of Schedule V controlled substances by rule which shall allow the sale of such substances without the need for issuance of a prescription from a medical practitioner and shall require such substances to be sold only in a pharmacy when such substances are sold without a prescription. Such substances shall be known as Exempt Over-the-Counter (OTC) Schedule V Controlled Substances. (Code 1981, § 16-13-29.2, enacted by Ga. L. 2003, p. 349, § 6.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2011, “Georgia” was deleted preceding “State Board of Pharmacy” in the first sentence.

16-13-30. Purchase, possession, manufacture, distribution, or sale of controlled substances or marijuana; penalties.

(a) Except as authorized by this article, it is unlawful for any person to purchase, possess, or have under his control any controlled substance.

(b) Except as authorized by this article, it is unlawful for any person to manufacture, deliver, distribute, dispense, administer, sell, or possess with intent to distribute any controlled substance.

(c) Except as otherwise provided, any person who violates subsection (a) of this Code section with respect to a controlled substance in Schedule I or a narcotic drug in Schedule II shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than two years nor more than 15 years. Upon conviction of a second or subsequent offense, he shall be imprisoned for not less than five years nor more than 30 years.

(d) Except as otherwise provided, any person who violates subsection (b) of this Code section with respect to a controlled substance in Schedule I or Schedule II shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than five years nor more than 30 years. Upon conviction of a second or subsequent offense, he or she shall be imprisoned for not less than ten years nor more than 40 years or life imprisonment. The provisions of subsection (a) of Code Section 17-10-7 shall not apply to a sentence imposed for a second such offense; provided, however, that the remaining provisions of Code Section 17-10-7 shall apply for any subsequent offense.

(e) Any person who violates subsection (a) of this Code section with respect to a controlled substance in Schedule II, other than a narcotic drug, shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than two years nor more than 15 years. Upon conviction of a second or subsequent offense, he shall be punished by imprisonment for not less than five years nor more than 30 years.

(f) Reserved.

(g) Any person who violates subsection (a) of this Code section with respect to a controlled substance in Schedule III, IV, or V shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one year nor more than five years. Upon conviction of a second or subsequent offense, he shall be imprisoned for not less than one year nor more than ten years.

(h) Any person who violates subsection (b) of this Code section with respect to a controlled substance in Schedule III, IV, or V shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one year nor more than ten years.

(i) Except as authorized by this article, it is unlawful for any person to possess, have under his control, manufacture, deliver, distribute, dispense, administer, purchase, sell, or possess with intent to distribute a counterfeit substance. Any person who violates this subsection shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one year nor more than ten years.

(j)(1) It is unlawful for any person to possess, have under his control, manufacture, deliver, distribute, dispense, administer, purchase, sell, or possess with intent to distribute marijuana.

(2) Except as otherwise provided in subsection (c) of Code Section 16-13-31 or in Code Section 16-13-2, any person who violates this subsection shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one year nor more than ten years.

(k) It shall be unlawful for any person to hire, solicit, engage, or use an individual under the age of 17 years, in any manner, for the purpose of manufacturing, distributing, or dispensing, on behalf of the solicitor, any controlled substance, counterfeit substance, or marijuana unless the manufacturing, distribution, or dispensing is otherwise allowed by law. Any person who violates this subsection shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than five years nor more than 20 years or by a fine not to exceed \$20,000.00, or both.

(1)(1) Any person who violates subsection (a) of this Code section with respect to flunitrazepam, a Schedule IV controlled substance, shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than two years nor more than 15 years. Upon conviction of a second or subsequent offense, such person shall be punished by imprisonment for not less than five years nor more than 30 years.

(2) Any person who violates subsection (b) of this Code section with respect to flunitrazepam, a Schedule IV controlled substance, shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than five years nor more than 30 years. Upon conviction of a second or subsequent offense, such person shall be punished by imprisonment for not less than ten years nor more than 40 years or life imprisonment. The provisions of subsection (a) of Code Section 17-10-7 shall not apply to a sentence imposed for a second such offense, but that subsection and the remaining provisions of Code Section 17-10-7 shall apply for any subsequent offense. (Code 1933, § 79A-811, enacted by Ga. L. 1974, p. 221, § 1; Ga. L. 1975, p. 1112, § 1; Ga. L. 1979, p. 1258, § 1; Ga. L. 1980, p. 432, § 1; Ga. L. 1985, p. 149, § 16; Ga. L. 1990, p. 992, § 1; Ga. L. 1992, p. 2041, § 1; Ga. L. 1996, p. 1023, §§ 1.1, 2; Ga. L. 1997, p. 1311, § 4.)

Cross references. — Jurisdiction in marijuana possession cases; retention of fines and forfeitures; transfer of cases, § 36-32-6. Use of marijuana for treatment of cancer and glaucoma, § 43-34-120 et seq.

Law reviews. — For article surveying judicial developments in Georgia Criminal Law, see 31 Mercer L. Rev. 59 (1979). For survey article on criminal law and

procedure, see 34 Mercer L. Rev. 89 (1982). For article, "Criminal Law," see 53 Mercer L. Rev. 209 (2001).

For note, "Substantive Due Process and Felony Treatment of Pot Smokers: The Current Conflict," see 2 Ga. L. Rev. 247 (1968). For note on airport searches of drug couriers, see 33 Mercer L. Rev. 433 (1981). For note on 1992 amendment of this Code section, see 9 Georgia St. U.L.

Rev. 212 (1992). For note, "Comparative Analysis of Democracy and Sentencing in the United States as a Model for Reform

in Iraq," see 33 Ga. J. Int'l & Comp. L. 303 (2004).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

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MARIJUANA

General Consideration

Editor's notes. — Many of the following annotations were taken from cases decided prior to the 1996 amendment of this Code section.

Constitutionality of paragraph (j)(1). — O.C.G.A. § 16-13-30(j)(1) is not vague and uncertain, and does not violate due process. *Walker v. State*, 261 Ga. 739, 410 S.E.2d 422 (1991).

Constitutionality of paragraph (j)(2). — Difference between punishments for purchase of marijuana under O.C.G.A. § 16-13-30(j)(2) and possession of the marijuana amount under O.C.G.A. § 16-13-2(b) does not constitute a denial of equal protection because imposition of a felony sentence under the former applies equally to all those accused of purchasing any amount of the controlled substance and, thus, there is no unconstitutional disparate treatment of similarly situated persons. *State v. Jackson*, 271 Ga. 5, 515 S.E.2d 386 (1999).

Right of privacy does not embrace right to possess dangerous drugs. *Blincoe v. State*, 231 Ga. 886, 204 S.E.2d 597 (1974).

General Assembly vested with discretion to determine what harmful substances shall be illegal. — It is a matter of discretion vested in General Assembly, in light of scientific knowledge available to it, to determine what harmful substances shall be declared to be illegal. *Blincoe v. State*, 231 Ga. 886, 204 S.E.2d 597 (1974).

Construction with other Code sections. — When one count of the accusation filed by the district attorney recited

that it was charged under O.C.G.A. § 16-13-30, which is a felony which may not be brought by accusation pursuant to O.C.G.A. § 17-7-70 without the assent of the accused, not on record in the case, nor was it one of those felonies listed in O.C.G.A. § 17-7-70.1 which, under circumstances not present in the case, may be pursued by accusation, the count was considered by the court to be brought under O.C.G.A. § 16-13-2(b), misdemeanor possession of less than an ounce of marijuana. *Chadwick v. State*, 236 Ga. App. 199, 511 S.E.2d 286 (1999).

Although a court may not sentence second time offenders under both O.C.G.A. §§ 16-13-30(d) and 17-10-7(a), the court may sentence second time offenders under both O.C.G.A. § 16-13-30(d) and any remaining provisions of O.C.G.A. § 17-10-7. *Brown v. State*, 252 Ga. App. 714, 556 S.E.2d 881 (2001).

Construed with O.C.G.A. §§ 16-13-26(1)(D) and 16-13-31. — When the total weight of the substances seized from defendant was only 24.4 grams of cocaine, the defendant argued that the only Georgia statute that proscribes possession of cocaine is O.C.G.A. § 16-13-31, which prohibits the possession of 28 grams or more of cocaine. However, although O.C.G.A. § 16-13-31 deals with being in knowing, actual possession of 28 grams or more of cocaine or any mixture containing cocaine, O.C.G.A. § 16-13-26(1)(D) (prior to 1988 amendment inserting "cocaine," at beginning of paragraph) lists "Coca leaves, any salt, compound, derivative, stereoisomers of cocaine, or preparation of coca leaves, and any salt, compound, derivative, stereoisomer

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mers of cocaine, or preparation thereof which is chemically equivalent or identical with any of these substances ...,” which includes cocaine. Under O.C.G.A. § 16-13-30, the unlawful possession of any controlled substance, regardless of amount, constitutes an offense. *Dixon v. State*, 180 Ga. App. 222, 348 S.E.2d 742 (1986) (decided prior to 1988 amendment of § 16-13-26).

Notice requirement of O.C.G.A. § 17-10-2(a) applies to mandatory life sentences imposed under O.C.G.A. § 16-13-30(d). *Moss v. State*, 206 Ga. App. 310, 425 S.E.2d 386 (1992).

In a prosecution for selling a controlled substance, imposition of a life sentence was improper where the state notified defendant of its intent to use previous drug convictions as similar transactions evidence but did not inform defendant of its intent to use the prior convictions in seeking the mandatory life sentence. *Miller v. State*, 219 Ga. App. 284, 464 S.E.2d 860 (1995).

Quantity purchased is not element of crime. — Sufficient evidence existed to support a defendant’s conviction of purchasing marijuana under O.C.G.A. § 16-13-30(j)(1) as the quantity purchased was not an element of the crime and the purchase could be established by proof of a promise to pay such as the defendant had made; however, the defendant’s conviction was reversed for failure to give a lesser included offense instruction. *Johnson v. State*, 296 Ga. App. 697, 675 S.E.2d 588 (2009), cert. denied, No. S09C1191, 2009 Ga. LEXIS 420 (Ga. 2009).

Jurisdiction in any county where crime could have been committed. — Under O.C.G.A. § 16-13-30(j)(1), it was unlawful for any person to possess marijuana and since the marijuana was found in defendant’s pocket when the defendant was arrested, and defendant was observed traveling in Newton County before defendant’s arrest in Rockdale County, the evidence was sufficient to conclude beyond a reasonable doubt that defendant was guilty of possession of less than one ounce of marijuana since O.C.G.A. § 17-2-2(e)

provided that if a crime was committed upon any vehicle traveling within the state and it cannot readily be determined in which county the crime was committed, the crime shall be considered as having been committed in any county in which the crime could have been committed through which the vehicle has traveled. *Johnson v. State*, 299 Ga. App. 706, 683 S.E.2d 659 (2009).

Poorly-worded charge. — Trial court did not err in allowing the manufacturing methamphetamine offense to proceed to the jury under O.C.G.A. § 16-13-30(b); despite the poor wording of the caption of the count at issue, which stated “trafficking in methamphetamine,” because the body of the count clearly charged the defendant with manufacturing methamphetamine, and the defendant failed to show how the defendant was misled by the presentment, nor did it expose the defendant to double jeopardy in violation of U.S. Const., amend. 5 or Ga. Const. 1983, Art. I, Sec. I, Para. XVIII. *Gentry v. State*, 281 Ga. App. 315, 635 S.E.2d 782 (2006), cert. denied, 2007 Ga. LEXIS 78 (Ga. 2007).

Refusal to sever charges. — Trial court did not abuse its discretion in failing to sever a charge against the defendant for possession of methamphetamine in violation of O.C.G.A. § 16-13-30(a) and a charge against the defendant for kidnapping with bodily injury in violation of O.C.G.A. § 16-5-40; when the defendant was arrested for possession, the kidnapping was ongoing, as the victim remained locked in the camper where the defendant had bound the victim, and it was not an abuse of discretion for a trial judge to deny a motion for severance where the crimes alleged were part of a continuous transaction and from the nature of the entire transaction, it would have almost been impossible to present to a jury evidence of one of the crimes without also permitting evidence of the other. *Johnson v. State*, 281 Ga. App. 7, 635 S.E.2d 278 (2006).

Illegal possession and sale of a controlled substance are separate and distinct crimes as a matter of law. *Harmon v. State*, 235 Ga. 329, 219 S.E.2d 441 (1975).

Illegal possession and illegal sale of a proscribed drug are separate

crimes as a matter of law. However, if the evidence required to convict an accused of the illegal sale is the only evidence showing illegal possession, then illegal possession is included in the crime of illegal sale as a matter of fact. *Sullivan v. State*, 178 Ga. App. 769, 344 S.E.2d 737 (1986).

Sale of noncontrolled substance not lesser-included offense. — Offense of unlawfully selling a noncontrolled substance while representing the substance to be a controlled substance (O.C.G.A. § 16-13-30.1) is not included in the offense of conspiracy to sell or distribute cocaine (O.C.G.A. § 16-13-30). *Smith v. State*, 202 Ga. App. 664, 415 S.E.2d 481 (1992).

No evidence of lesser included offense of possession of cocaine. — With regard to a defendant's conviction for trafficking in cocaine, the trial court did not err by failing to charge the jury on the lesser included offense of possession of cocaine with intent to distribute as there was no dispute that the cocaine exceeded the amount necessary to sustain a trafficking conviction, therefore, there was no evidence of the lesser included offense. However, even if the trial court's failure to give the requested instruction was error, it is highly probable that the error did not contribute to the verdict in light of the overwhelming evidence that the defendant committed the greater offense. *Celestin v. State*, 296 Ga. App. 727, 675 S.E.2d 480 (2009), cert. denied, No. S09C1200, 2009 Ga. LEXIS 340 (Ga. 2009).

Sell and possession of cocaine did not merge. — Offenses of selling cocaine and possessing cocaine in violation of O.C.G.A. § 16-13-30(a) and (b) did not merge because two discrete portions of cocaine were used to prove the two discrete offenses; the offense of selling cocaine was proven by evidence of a crack cocaine sale to a confidential informant, and the offense of possessing cocaine was proven by the evidence that the defendant possessed the additional crack cocaine later found in the car the defendant occupied. *Robertson v. State*, 306 Ga. App. 721, 703 S.E.2d 343 (2010).

Possession included in trafficking offense. — Offenses of possession of co-

caine and possession of cocaine with intent to distribute were lesser included offenses, as a matter of fact, of the trafficking offense since proof of the two possession offenses was established by "the same or less than all the facts" required to establish the distribution offense; thus, it was error to convict defendant of all three offenses. *Hancock v. State*, 210 Ga. App. 528, 437 S.E.2d 610 (1993).

Even if the first count of an indictment did indeed charge both possession of marijuana with intent to distribute and simple possession, those offenses could be joined in one count because they were offenses of the same nature that differed only in degree and that related to only one transaction; thus, the count was not subject to demurrer as duplicitous. *Davis v. State*, 285 Ga. App. 460, 646 S.E.2d 342 (2007).

Distinguishing trafficking from possession. — Amount of controlled substance is chosen as the basis for distinguishing the crime of trafficking from the somewhat less serious crimes described in O.C.G.A. § 16-13-30. Twenty-eight grams was chosen as the dividing line. *Bassett v. Lemacks*, 258 Ga. 367, 370 S.E.2d 146 (1988).

Conviction for possessing cocaine was not inconsistent with acquittal of trafficking in cocaine, when the cocaine upon which the possession offense was based had been seized at a different time and place from the cocaine upon which the trafficking offense was based. *Rogers v. State*, 182 Ga. App. 599, 356 S.E.2d 546 (1987).

Evidence did not demand acquittal of methamphetamine charges. — Defendant was not entitled to an acquittal on either a charge of conspiracy to manufacture methamphetamine or possession of methamphetamine, as the evidence showed that methamphetamine was being manufactured inside the residence in which defendant was found, and conviction of possession of methamphetamine did not rest solely upon evidence that the methamphetamine was found on the premises also occupied by others, nor did such conviction rest solely upon defendant's spatial proximity to the contraband. *McWhorter v. State*, 275 Ga. App.

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624, 621 S.E.2d 571 (2005).

Mere possession will not serve as basis for conviction for possessing contraband for purposes of sale. *Wright v. State*, 154 Ga. App. 400, 268 S.E.2d 378, cert. denied, 449 U.S. 900, 101 S. Ct. 270, 66 L. Ed. 2d 130 (1980).

When illegal possession is included in illegal sale as matter of fact. — If evidence required to convict of illegal sale of controlled substance is the only evidence showing possession, illegal possession is included in crime of illegal sale as a matter of fact. *Harmon v. State*, 235 Ga. 329, 219 S.E.2d 441 (1975).

When possession and possession with intent to distribute may both be punished. — If a person intends to distribute only a designated part of narcotics which are possessed, both offense of possession and possession with intent to distribute may be punished. *Howard v. State*, 144 Ga. App. 208, 240 S.E.2d 908 (1977).

Merger. — Offense of manufacturing methamphetamine under O.C.G.A. § 16-13-30(b) was a lesser included offense of trafficking/manufacturing under O.C.G.A. § 16-31-31(f)(1); thus, the trial court was authorized to sentence a defendant for the greater offense after merging the lesser offense into it. *Richards v. State*, 290 Ga. App. 360, 659 S.E.2d 651 (2008).

Selling merged into trafficking offense. — Convictions on counts for selling methamphetamine were lesser included offenses of convictions for trafficking in methamphetamine and, therefore, merged into the trafficking convictions. *Nunery v. State*, 229 Ga. App. 246, 493 S.E.2d 610 (1997).

No merger with misdemeanor DUI charge. — Defendant could be convicted on both felony possession of methamphetamine and driving under the influence of methamphetamine, a misdemeanor. *Helmecki v. State*, 230 Ga. App. 866, 498 S.E.2d 326 (1998).

Possession and distribution of methamphetamine charges did not merge. — Possession of methamphetamine and distribution of methamphetamine charges did not merge under O.C.G.A. § 16-1-7 when defendant

smoked methamphetamine in the company of a second person who later returned with a fresh supply of the drug with which defendant injected the second person; methamphetamine that defendant possessed while smoking constituted a separate amount of methamphetamine not accounted for in the distribution charge. *Crutchfield v. State*, 291 Ga. App. 24, 660 S.E.2d 878 (2008).

Manufacturing methamphetamine. — Evidence was sufficient for a jury to find defendant guilty of manufacturing methamphetamine, as defendant leased a house in which a widespread methamphetamine manufacturing operation took place, which created a strong chemical smell immediately apparent upon entering the house, and defendant tested positive for methamphetamine, circumstantially linking defendant to the manufacturing process and undermining defendant's claim that defendant was unaware of the activity. *Kirby v. State*, 275 Ga. App. 216, 620 S.E.2d 459 (2005).

Defendant's conviction of manufacturing methamphetamine under O.C.G.A. § 16-13-30(b) was supported by sufficient evidence as the presence of chemicals and supplies as well as methamphetamine in the various containers of liquid were all indicative of a methamphetamine manufacturing operation, and testimony indicated the presence of a level of contamination in the defendant's apartment that showed that the laboratory had probably been in operation for several weeks; furthermore, the scope of the operation was such that it could not have been hidden from the defendant by defendant's co-tenant. *Gentry v. State*, 281 Ga. App. 315, 635 S.E.2d 782 (2006), cert. denied, 2007 Ga. LEXIS 78 (Ga. 2007).

Because the evidence surrounding the stop of the defendant and the evidence seized thereon, including money, various guns, and almost 43 grams of methamphetamine, was sufficient to support a conviction for possession of methamphetamine with intent to distribute, the conviction was upheld on appeal; moreover, based on trial counsel's testimony and evidence that both counsel and the defendant extensively discussed the pros and cons of having a jury hear the case, suffi-

cient extrinsic evidence showed that the defendant knowingly, voluntarily, and intelligently waived any right to a trial by jury. *Whitaker v. State*, 286 Ga. App. 143, 648 S.E.2d 396 (2007).

Rule of lenity did not apply to imitation controlled substances. — Trial court did not err by refusing to apply the rule of lenity with regard to a defendant's conviction for selling a counterfeit substance because the evidence revealed that the substance would not fall under either definition of "imitation controlled substance" set forth in O.C.G.A. § 16-13-21(12.1)(A) as the parties stipulated only that the substance recovered was not a controlled substance and there was no evidence presented that the substance was specifically designed or manufactured to resemble the physical appearance of a controlled substance. As a result, the rule of lenity did not apply, and the trial court properly sentenced the defendant for a felony. *Chandler v. State*, 294 Ga. App. 27, 668 S.E.2d 510 (2008).

Prior similar act admissible. — Prior guilty plea to charge of selling cocaine was substantially relevant to corroborate identification of defendant as seller, and as a prior similar act, it was similar and relevant. *Evans v. State*, 209 Ga. App. 606, 434 S.E.2d 148 (1993).

Evidence showing independent crimes involving similar dollar amounts of drugs sold in sidewalk sales to passing vehicles was sufficient proof of similarity between other crimes and the one for which defendant was indicted. *Aldridge v. State*, 222 Ga. App. 437, 475 S.E.2d 195 (1996).

Admission of similar transaction evidence in a case charging the defendant with possession of cocaine with intent to distribute, O.C.G.A. § 16-13-30(b), and obstructing or hindering law enforcement officers, O.C.G.A. § 16-10-24, was proper because, in both the similar transaction and the incident leading to the charges being tried, the defendant was arrested in possession of cocaine and "sale-sized" baggies after seeking to avoid police; the trial court also gave an instruction that the similar transaction evidence was limited to the purpose of showing the defendant's bent of mind in committing the charged offenses. *Cotton v. State*, 297 Ga. App. 664, 678 S.E.2d 128 (2009).

Defendant was properly convicted of trafficking in methamphetamine, O.C.G.A. § 16-13-31, violating the Georgia Controlled Substances Act, O.C.G.A. § 16-13-30, and contributing to the delinquency of a minor, O.C.G.A. § 16-12-1, because the trial court properly admitted the state's similar transaction evidence when the evidence was introduced for the appropriate purpose of showing the defendant's knowledge and intent regarding the methamphetamine found in the defendant's room, and the trial court instructed the jury to consider the evidence for that limited purpose; both incidents occurred on the same street and both involved methamphetamine, and in both incidents police found the drugs in the defendant's bedroom along with scales. *Swan v. State*, 300 Ga. App. 667, 686 S.E.2d 310 (2009).

During defendant's trial for possession of methamphetamine and possession of marijuana, the trial court did not abuse the court's discretion in admitting evidence of the defendant's prior conviction on an obstruction charge because the trial court admitted the evidence for the purpose of showing the defendant's course of conduct only after conducting a hearing pursuant to Ga. Unif. Super. Ct. R. 31.3(B), which the court was required to do, and the state satisfied the criteria delineated in Rule 31.3 for the admission of similar-transaction evidence; even assuming that the similar-transaction evidence should have been excluded, any error in the evidence's admission was harmless because there was videotaped evidence that the defendant was driving an obviously stolen vehicle, that the defendant fled from officers who attempted to conduct a traffic stop, that the defendant continued to lead the officers on a chase even after the defendant's tires had been flattened, that the defendant ultimately exited the vehicle and ran on foot, and that methamphetamine and marijuana not belonging to the owner were found inside the vehicle in which the defendant was the sole occupant. *Mangum v. State*, 308 Ga. App. 84, 706 S.E.2d 612 (2011).

Admissibility of expert testimony. — Knowledge of the amount of crack cocaine one would generally possess for per-

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sonal use or the amount which might evidence distribution is not necessarily within the scope of the ordinary layman's knowledge and experience. Therefore, the testimony of a veteran police officer on the subject would be properly admissible under O.C.G.A. § 24-9-67. *Davis v. State*, 200 Ga. App. 44, 406 S.E.2d 555 (1991).

Defendant's argument that the evidence was insufficient to support defendant's conviction for possession by ingestion of methamphetamine because the testimony of defendant's expert witness, a forensic toxicologist with a private clinical reference laboratory, called into question the validity of the state crime lab report, was rejected because the determination of the credibility of defendant's expert and the effect of the expert's testimony on the validity of the state crime lab report were for the jury. *Poston v. State*, 274 Ga. App. 117, 617 S.E.2d 150 (2005).

Officer properly qualified as expert witness in drug possession and distribution. — In a prosecution for possession of cocaine with intent to distribute (O.C.G.A. § 16-13-30(b)), the trial court did not abuse the court's discretion in qualifying the officer as an expert witness in drug possession and distribution as the arresting officer testified to making 35 to 40 drug-related arrests, about half of which were for possession with intent to distribute. *Hight v. State*, 293 Ga. App. 254, 666 S.E.2d 678 (2008).

Testimony of confidential informant admissible. — When the confidential informant testified and was subject to cross-examination, the informant's statement that the informant found out that the defendant was selling cocaine out of the defendant's residence was admissible to explain the circumstances leading to the defendant's arrest. *Hamilton v. State*, 242 Ga. App. 77, 528 S.E.2d 843 (2000).

Affidavit supporting search warrant not stale. — In a trial for possession of marijuana with intent to distribute, the trial court did not err in denying a motion to suppress a search warrant on the basis that a nine-month lapse from the crimes' occurrences rendered stale the information contained in the affidavit in support

of the warrant since the information in the affidavit was not so remote that it made it unlikely that the items sought would not have been in the defendant's home at the time the warrant was issued. *Amica v. State*, 307 Ga. App. 276, 704 S.E.2d 831 (2010).

Suppression of evidence. — Motion to suppress illegally obtained evidence was properly granted. *State v. Crank*, 212 Ga. App. 246, 441 S.E.2d 531 (1994).

Because the defendant did not grant consent to an officer to search the defendant's purse, and no other exception to the warrant requirement allowing a search of the purse applied, the trial court properly granted suppression of the drugs seized from within the purse. *State v. Fulghum*, 288 Ga. App. 746, 655 S.E.2d 321 (2007).

Consequence of a defendant's failure to contemporaneously object to the admission of evidence. — Despite the defendant's contrary claim on appeal, because trial counsel failed to contemporaneously object to the introduction of the defendant's own statement offering to sell narcotics to a confidential informant, the defendant waived any error regarding admission of the statement on appeal; moreover, because trial counsel failed to request a mistrial or curative instruction regarding that evidence, the trial court's failure to give such an instruction, sua sponte, was not erroneous. *Williams v. State*, 288 Ga. App. 741, 655 S.E.2d 674 (2007).

Jury instruction on substance of O.C.G.A. §§ 16-13-30 and 16-13-31. — When the defendant was charged with trafficking in cocaine and possession of marijuana and on the day of the trial filed a request that the "jury be charged with the substance of § 16-13-30 and § 16-13-31," by seeking an instruction on two entire Code sections the request necessarily included much matter not adjusted to the issues of the case, and for this reason it was not error to fail to give such instructions. *Partridge v. State*, 187 Ga. App. 325, 370 S.E.2d 173, cert. denied, 187 Ga. App. 908, 370 S.E.2d 173 (1988).

Jury instruction on actual and constructive possession. — In the absence of a request, a court's failure to give an instruction defining actual and construc-

tive possession does not constitute reversible error. *Black v. State*, 167 Ga. App. 204, 305 S.E.2d 837 (1983).

When a jury issue exists as to whether the defendant was exercising actual or constructive possession of cocaine, the lesser offense of possession of cocaine was reasonably raised by the evidence, and the trial court committed prejudicial error in failing to instruct pursuant to the defendant's written request. *Alvarado v. State*, 194 Ga. App. 781, 391 S.E.2d 668, aff'd, 260 Ga. 563, 397 S.E.2d 550 (1990).

Because there was evidence that the defendant, at different times, had both actual and constructive possession of marijuana, the trial court's jury charge on both types of possession was proper and did not impermissibly expand the indictment, which did not specify the manner of possession. *Davis v. State*, 285 Ga. App. 460, 646 S.E.2d 342 (2007).

Jury instruction on equal access not required. — When a defendant was charged with possession of cocaine with intent to distribute, it was not error to fail to give a charge on equal access. The state was not relying upon the defendant's ownership or control of the home to prove that cocaine in the kitchen belonged to the defendant, but upon direct evidence that the defendant tossed the cocaine into the kitchen after being apprehended by an officer; furthermore, a charge on constructive possession was not tantamount to a charge on the presumption of ownership. *Thomas v. State*, 291 Ga. App. 795, 662 S.E.2d 849 (2008).

In a prosecution for possession of cocaine with intent to distribute (O.C.G.A. § 16-13-30(b)), the defendant was not entitled to an instruction on equal access, which applied only when the sole evidence of possession of contraband found in a vehicle was the defendant's ownership or possession of the vehicle. There was additional evidence showing that the drugs belonged to the defendant: (1) a large sum of cash on the defendant's person; (2) the defendant's prior conviction for possession of cocaine with intent to distribute; and (3) testimony that the defendant conducted another drug transaction on the day of the arrest. *Hight v. State*, 293 Ga. App. 254, 666 S.E.2d 678 (2008).

Because equal access was not a defendant's sole defense to a charge of possession with intent to distribute cocaine, the trial court was not required sua sponte to give a charge on equal access after the court gave the jury an instruction on presumption of possession based on ownership of the premises. *Bailey v. State*, 294 Ga. App. 437, 669 S.E.2d 453 (2008).

Jury instruction on lesser included offense. — Trial court did not err in instructing the jury to consider the lesser offense of possession of methamphetamine only if the jury did not believe beyond a reasonable doubt that the defendant was guilty of possession of methamphetamine with intent to distribute because the trial court did not insist upon unanimity with regard to the jury's decision on the greater offense. *Dockery v. State*, 308 Ga. App. 502, 707 S.E.2d 889 (2011).

Curative instruction properly given. — Sale of marijuana convictions, in violation of O.C.G.A. § 16-13-30(j), were upheld, as an officer's in-court identification of defendant was obtained via investigative techniques and was thus not unduly suggestive, and the trial court gave curative instructions to the jury after the officer testified to pulling defendant's photograph from an arrest record. *Hansberry v. State*, 260 Ga. App. 480, 580 S.E.2d 274 (2003).

Because the state presented sufficient evidence showing defendant's involvement in the sale of cocaine and the sale of cocaine within 1,000 feet of a public housing project as a party to the crimes, and because the judge's instruction and explanation after reading the wrong indictment to the jury at trial cured any error, the defendant's convictions were upheld on appeal, and a mistrial based on the latter was properly denied; moreover, the defendant was properly denied a new trial. *Walker v. State*, 290 Ga. App. 749, 660 S.E.2d 844 (2008), cert. dismissed, 2008 Ga. LEXIS 776 (Ga. 2008).

Jury instruction on further deliberations. — On appeal from a conviction for possession of cocaine, because the verdict of "guilty with reasonable doubt" was unclear and had no single element that was necessarily dispositive of the jury's finding

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with regard to ultimate criminal responsibility, the trial court did not err by refusing to accept the verdict and in sending the jury out for further deliberations with proper instructions. *Robinson v. State*, 282 Ga. App. 214, 638 S.E.2d 370 (2006), cert. denied, 2007 Ga. LEXIS 152 (Ga. 2007).

Jury instruction insufficient. — Jury charge failed to define properly the offenses of trafficking in methamphetamine and possession of methamphetamine with intent to distribute because all the jury was told was that it was a violation of the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., to traffic or possess with intent to distribute methamphetamine; the instructions given completely failed to inform the jury about the manner in which the offense of trafficking in methamphetamine or the offense of possessing methamphetamine with intent to distribute may have been committed. As such, the jury did not receive sufficient instructions to guide the jury in determining the defendant's guilt or innocence on these charges. *Torres v. State*, 298 Ga. App. 158, 679 S.E.2d 757 (2009).

Recharge on "sale" proper in jury instruction. — Trial court did not err in recharging the jury after the jury requested a specific definition of "sale" under O.C.G.A. § 16-13-30 because the court acted within the court's discretion by simply referring the jury back to the correct charge, rather than giving a lengthy explanation of the absence of a word-for-word definition in O.C.G.A. § 16-13-30, and given that the charge was correct as given initially, the recharge did not deprive the defendant of any legitimate defense to the defendant's actions; the jury appeared to be confused about whether the jury had a proper definition of a sale, and when the trial court referred the jury to the correct law that had already been given, it sufficiently informed the jury that the jury had the definition that the jury needed. *Ware v. State*, 308 Ga. App. 24, 707 S.E.2d 111 (2011).

"Ontrack system" test results for marijuana inadmissible. — State's fail-

ure to present any evidence as to the characteristics, theory, operation, reliability, or scientific acceptability of "ontrack system" test performed on the defendant's urine specimen at local jail to detect the presence of tetrahydrocannabinol rendered the results of the test inadmissible. *Hubbard v. State*, 207 Ga. App. 703, 429 S.E.2d 123 (1993).

Forfeiture statute. — Forfeiture statute, O.C.G.A. § 16-13-49, did not apply to a transaction involving an imitation controlled substance. *White v. State*, 264 Ga. 547, 448 S.E.2d 354 (1994).

Plea bargaining. — Although the prosecutor incorrectly stated the minimum and maximum sentences in negotiating a plea bargain, defendant rejected the plea bargain and defendant's decision was a fully informed one. Accordingly, denial of a new trial was proper because there was no showing that defendant was harmed by the misstatement. *Hester v. State*, 261 Ga. App. 614, 583 S.E.2d 274 (2003).

Guilty pleas. — Because the defendant confirmed that the defendant was not under the influence of drugs, that the defendant was satisfied with counsel's representation, and that the defendant wished to plead guilty to selling cocaine, the trial court did not err in accepting the guilty plea. *McCloud v. State*, 272 Ga. App. 609, 612 S.E.2d 907 (2005).

Trial court did not abuse the court's discretion by finding that a defendant's guilty plea was voluntarily, knowingly, and intelligently made as to a conviction for possession of cocaine because the trial court had no obligation to inform the defendant of the possible collateral consequence of the revocation for a prior offense and, because the defendant was represented by counsel, the trial court properly presumed that the defendant's counsel had informed the defendant of such a collateral consequence. *Lamb v. State*, 278 Ga. App. 97, 628 S.E.2d 165 (2006).

Claimed errors on appeal deemed abandoned. — While the defendant argued that the state's evidence was insufficient to support convictions on two counts of selling cocaine in violation of O.C.G.A. § 16-13-30(b), and cited the proper standard of review, due to the lack

of argument, citation of authority, or citations to the record to support this position that claim was abandoned under Ga. Ct. App. R. 25(c)(2). *Clark v. State*, 285 Ga. App. 182, 645 S.E.2d 671 (2007).

Ineffective assistance. — In a prosecution for selling marijuana and possessing marijuana with the intent to distribute, given that the state conceded that the state failed to file notice regarding the state's intent to introduce a prior conviction as evidence in aggravation of punishment, the evidence was not introduced; as a result, defense counsel could not be found ineffective for failing to object to the introduction of the prior conviction. *Allen v. State*, 280 Ga. App. 663, 634 S.E.2d 831 (2006).

Trial court did not err in denying the defendant's motion for a new trial on the ground that the defendant's trial counsel rendered ineffective assistance by failing to obtain an electronic enhancement of a videotape depicting a drug sale, which allegedly would have shown that defendant was not the perpetrator of the offense, because the defendant failed to show that the defendant was prejudiced as a result of trial counsel's failure to obtain an electronic enhancement of the videotape prior to trial since the enhanced images failed to create a reasonable probability that the defendant was not the perpetrator depicted in the images; an undercover officer unequivocally identified the defendant as the perpetrator based upon the officer's personal observations and independent memory of the defendant at the time of the drug sale, and although the defendant attempted to prove that another individual was the perpetrator depicted in the videotape's images, the defendant failed to proffer sufficient evidence in support of the defendant's claim. *Faulkner v. State*, 304 Ga. App. 791, 697 S.E.2d 914 (2010).

Counsel's deficiency did not warrant a new trial. — While the defendant's trial counsel was ineffective in failing to object to that portion of the state's closing argument in which the prosecutor referenced a slain officer's funeral a week prior, as that fact had no relevance to the charges the defendant was facing, based on the overwhelming evidence of guilt,

including the defendant's admission, the defendant's convictions for trafficking in cocaine and possession of cocaine with intent to distribute were upheld on appeal; thus, a new trial was properly denied. *Cantrell v. State*, 290 Ga. App. 651, 660 S.E.2d 468 (2008).

New trial motion properly denied. — Upon convictions of possessing cocaine with intent to distribute and obstructing a law enforcement officer, the trial court properly denied the defendant's motion for a new trial as: (1) a challenged juror affirmed the guilty verdict; (2) details about a government witness's plea deal would not have changed the trial outcome; and (3) lab results confirming the purity of the contraband seized was sufficient to show that the substance defendant possessed was cocaine. *Tate v. State*, 278 Ga. App. 324, 628 S.E.2d 730 (2006).

Upon convictions on two counts of selling cocaine, the trial court properly denied the defendant a new trial as the state's commentary during opening and closing argument on the connection between illegal drugs and crime in the community was proper, no abuse of discretion resulted from the admission of the defendant's booking mug shot, and the state's identification witnesses could testify about their level of certainty in identifying the defendant. *Clark v. State*, 285 Ga. App. 182, 645 S.E.2d 671 (2007).

Cited in *Lord v. State*, 235 Ga. 342, 219 S.E.2d 425 (1975); *Wilson v. State*, 136 Ga. App. 70, 221 S.E.2d 62 (1975); *Mitchell v. State*, 136 Ga. App. 658, 222 S.E.2d 160 (1975); *Kincaid v. State*, 137 Ga. App. 138, 223 S.E.2d 152 (1975); *Dunkum v. State*, 138 Ga. App. 321, 226 S.E.2d 133 (1976); *Winget v. State*, 138 Ga. App. 433, 226 S.E.2d 608 (1976); *Tolbert v. State*, 138 Ga. App. 724, 227 S.E.2d 416 (1976); *Weatherington v. State*, 139 Ga. App. 795, 229 S.E.2d 676 (1976); *Loder v. State*, 140 Ga. App. 166, 230 S.E.2d 124 (1976); *Warren v. State*, 140 Ga. App. 565, 231 S.E.2d 459 (1976); *Benefield v. State*, 140 Ga. App. 727, 232 S.E.2d 89 (1976); *Hawkins v. State*, 141 Ga. App. 31, 232 S.E.2d 377 (1977); *Keating v. State*, 141 Ga. App. 377, 233 S.E.2d 456 (1977); *Sisson v. State*, 141 Ga. App. 559, 234 S.E.2d 146 (1977); *Roberts v. State*, 141 Ga. App. 571, 234 S.E.2d

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- 356 (1977); *Johnson v. Hopper*, 238 Ga. 670, 235 S.E.2d 27 (1977); *Alexander v. State*, 239 Ga. 810, 239 S.E.2d 18 (1977); *Taylor v. State*, 144 Ga. App. 534, 241 S.E.2d 590 (1978); *Hammock v. State*, 146 Ga. App. 339, 246 S.E.2d 392 (1978); *Aycock v. State*, 146 Ga. App. 489, 246 S.E.2d 489 (1978); *Kiriazee v. State*, 147 Ga. App. 832, 250 S.E.2d 568 (1978); *Hughes v. State*, 150 Ga. App. 90, 256 S.E.2d 634 (1979); *Robinson v. State*, 244 Ga. 15, 257 S.E.2d 523 (1979); *Parks v. State*, 150 Ga. App. 446, 258 S.E.2d 66 (1979); *Black v. State*, 154 Ga. App. 441, 268 S.E.2d 724 (1980); *Baxter v. State*, 154 Ga. App. 861, 270 S.E.2d 71 (1980); *Giddens v. State*, 156 Ga. App. 258, 274 S.E.2d 595 (1980); *Mitchell v. State*, 156 Ga. App. 769, 275 S.E.2d 345 (1980); *Holley v. State*, 157 Ga. App. 863, 278 S.E.2d 738 (1981); *Ward v. State*, 248 Ga. 60, 281 S.E.2d 503 (1981); *Printup v. State*, 159 Ga. App. 574, 284 S.E.2d 82 (1981); *State v. Shuman*, 161 Ga. App. 304, 287 S.E.2d 757 (1982); *Rains v. State*, 161 Ga. App. 361, 288 S.E.2d 626 (1982); *Dalton v. State*, 162 Ga. App. 7, 289 S.E.2d 801 (1982); *Holbrook v. State*, 162 Ga. App. 400, 291 S.E.2d 729 (1982); *Henderson v. State*, 162 Ga. App. 320, 292 S.E.2d 77 (1982); *Dalton v. State*, 249 Ga. 720, 292 S.E.2d 834 (1982); *Cobb County Bd. of Educ. v. Vizcarrondo*, 162 Ga. App. 711, 293 S.E.2d 13 (1982); *McAdoo v. State*, 164 Ga. App. 23, 295 S.E.2d 114 (1982); *Luck v. State*, 163 Ga. App. 657, 295 S.E.2d 584 (1982); *Gunn v. State*, 163 Ga. App. 906, 296 S.E.2d 221 (1982); *Bell v. State*, 164 Ga. App. 477, 298 S.E.2d 160 (1982); *Davis v. State*, 164 Ga. App. 633, 298 S.E.2d 615 (1982); *Hawkins v. State*, 165 Ga. App. 278, 300 S.E.2d 224 (1983); *McLeod v. State*, 170 Ga. App. 415, 317 S.E.2d 253 (1984); *Felker v. State*, 172 Ga. App. 492, 323 S.E.2d 817 (1984); *Johnson v. State*, 174 Ga. App. 751, 330 S.E.2d 925 (1985); *Martin v. State*, 175 Ga. App. 704, 334 S.E.2d 32 (1985); *Barnes v. State*, 255 Ga. 396, 339 S.E.2d 229 (1986); *Hall v. State*, 177 Ga. App. 464, 339 S.E.2d 658 (1986); *Dimick v. State*, 178 Ga. App. 60, 341 S.E.2d 914 (1986); *Ingram v. State*, 178 Ga. App. 292, 342 S.E.2d 765 (1986); *Boyer v. State*, 178 Ga. App. 372, 343 S.E.2d 146 (1986); *State v. Whitlock*, 179 Ga. App. 460, 346 S.E.2d 896 (1986); *Sablon v. State*, 182 Ga. App. 128, 355 S.E.2d 88 (1987); *Parrish v. State*, 182 Ga. App. 247, 355 S.E.2d 682 (1987); *Sellers v. State*, 182 Ga. App. 277, 355 S.E.2d 770 (1987); *Sidwell v. State*, 185 Ga. App. 138, 363 S.E.2d 603 (1987); *Saylor v. State*, 185 Ga. App. 634, 365 S.E.2d 493 (1988); *Darty v. State*, 188 Ga. App. 447, 373 S.E.2d 389 (1988); *Georgia v. Six Hundred Forty Thousand, Seven Hundred Sixty-Eight Dollars in United States Currency*, 712 F. Supp. 180 (N.D. Ga. 1988); *Mobley v. State*, 190 Ga. App. 771, 380 S.E.2d 290 (1989); *Causey v. State*, 192 Ga. App. 294, 384 S.E.2d 674 (1989); *Owens v. State*, 192 Ga. App. 335, 384 S.E.2d 920 (1989); *In re M.J.H.*, 193 Ga. App. 621, 388 S.E.2d 738 (1989); *Gibson v. State*, 193 Ga. App. 450, 388 S.E.2d 45 (1989); *Edwards v. State*, 260 Ga. 121, 390 S.E.2d 580 (1990); *Edwards v. State*, 194 Ga. App. 571, 391 S.E.2d 137 (1990); *Lipscomb v. State*, 194 Ga. App. 657, 391 S.E.2d 773 (1990); *Cook v. State*, 195 Ga. App. 69, 392 S.E.2d 556 (1990); *Emanuel v. State*, 195 Ga. App. 302, 393 S.E.2d 74 (1990); *Cody v. State*, 195 Ga. App. 318, 393 S.E.2d 692 (1990); *Hollingsworth v. State*, 195 Ga. App. 502, 394 S.E.2d 131 (1990); *Brown v. State*, 197 Ga. App. 568, 398 S.E.2d 842 (1990); *Darden v. State*, 197 Ga. App. 569, 398 S.E.2d 843 (1990); *Josey v. State*, 199 Ga. App. 780, 406 S.E.2d 125 (1991); *Rhodes v. State*, 200 Ga. App. 193, 407 S.E.2d 442 (1991); *Banks v. State*, 201 Ga. App. 266, 410 S.E.2d 818 (1991); *Poole v. State*, 201 Ga. App. 554, 411 S.E.2d 562 (1991); *Jones v. State*, 202 Ga. App. 162, 413 S.E.2d 784 (1991); *Carroll v. State*, 202 Ga. App. 544, 415 S.E.2d 37 (1992); *Cleveland v. State*, 204 Ga. App. 101, 418 S.E.2d 430 (1992); *Ricks v. State*, 204 Ga. App. 441, 419 S.E.2d 517 (1992); *Wood v. State*, 204 Ga. App. 467, 419 S.E.2d 534 (1992); *Bowens v. State*, 209 Ga. App. 130, 433 S.E.2d 102 (1993); *James v. State*, 209 Ga. App. 389, 433 S.E.2d 700 (1993); *Walker v. State*, 210 Ga. App. 139, 435 S.E.2d 259 (1993); *Dean v. State*, 211 Ga. App. 28, 438 S.E.2d 380 (1993); *Banks v. State*, 229 Ga. App. 414, 493 S.E.2d 923 (1997); *Mann v. State*,

240 Ga. App. 809, 524 S.E.2d 763 (1999); Daniels v. State, 244 Ga. App. 522, 536 S.E.2d 206 (2000); Wheeler v. State, 249 Ga. App. 116, 547 S.E.2d 746 (2001); Lovain v. State, 253 Ga. App. 271, 558 S.E.2d 812 (2002); Gray v. State, 254 Ga. App. 487, 562 S.E.2d 712 (2002); Hill v. State, 253 Ga. App. 658, 560 S.E.2d 88 (2002); Welch v. State, 263 Ga. App. 70, 587 S.E.2d 220 (2003); United States v. Madera-Madera, 333 F.3d 1228 (11th Cir.); In the Interest of P.R., 282 Ga. App. 480, 638 S.E.2d 898 (2006); Lawton v. State, 281 Ga. 459, 640 S.E.2d 14 (2007); Patrick v. State, 284 Ga. App. 472, 644 S.E.2d 309 (2007); Capestany v. State, 289 Ga. App. 47, 656 S.E.2d 196 (2007); Thomas v. State, 289 Ga. App. 161, 657 S.E.2d 247 (2008); Kohlmeier v. State, 289 Ga. App. 709, 658 S.E.2d 261 (2008); Cantrell v. State, 290 Ga. App. 651, 660 S.E.2d 468 (2008); Heard v. State, 291 Ga. App. 550, 662 S.E.2d 310 (2008); Hicks v. State, 293 Ga. App. 745, 667 S.E.2d 715 (2008); In the Interest of T. F., 295 Ga. App. 417, 671 S.E.2d 887 (2008); King v. State, 295 Ga. App. 865, 673 S.E.2d 329 (2009); Proctor v. State, 298 Ga. App. 388, 680 S.E.2d 493 (2009); Miller v. State, 298 Ga. App. 792, 681 S.E.2d 225 (2009); Cox v. State, 300 Ga. App. 109, 684 S.E.2d 147 (2009); Henry v. State, 301 Ga. App. 723, 688 S.E.2d 412 (2009); Russell v. State, 308 Ga. App. 328, 707 S.E.2d 543 (2011).

Sentencing

Constitutionality of subsection (d).

— O.C.G.A. § 16-13-30(d), which mandates a sentence of life imprisonment upon a second conviction for selling cocaine, is not unconstitutional; it does not violate the Eighth and the Fourteenth Amendments to the Constitution of the United States. Grant v. State, 258 Ga. 299, 368 S.E.2d 737 (1988); Rucks v. State, 201 Ga. App. 142, 410 S.E.2d 206 (1991); Carr v. State, 201 Ga. App. 479, 411 S.E.2d 913 (1991); Crutchfield v. State, 218 Ga. App. 360, 461 S.E.2d 555 (1995).

Mandatory life imprisonment sentence found in O.C.G.A. § 16-13-30(d) does not unconstitutionally deprive a defendant of due process of law. Tillman v. State, 260 Ga. 801, 400 S.E.2d 632 (1991).

Mandatory life sentence of O.C.G.A.

§ 16-13-30(d) does not constitute cruel and unusual punishment under Ga. Const. 1983, Art. I, Sec. I, Para. XVII. Stephens v. State, 261 Ga. 467, 405 S.E.2d 483 (1991); Cody v. State, 222 Ga. App. 468, 474 S.E.2d 669 (1996).

O.C.G.A. § 16-13-30(d) does not violate the equal protection or due process guarantees of the Georgia and federal constitutions. Isom v. State, 261 Ga. 596, 408 S.E.2d 701 (1991).

O.C.G.A. § 16-13-30(d) does not violate state or federal constitutional guarantees against cruel and unusual punishment. Isom v. State, 261 Ga. 596, 408 S.E.2d 701 (1991); Martin v. State, 205 Ga. App. 200, 422 S.E.2d 6 (1992); Crutchfield v. State, 218 Ga. App. 360, 461 S.E.2d 555 (1995).

Sentencing scheme in O.C.G.A. § 16-13-30(d) cannot be found unconstitutional for not having a rational basis since the legislature may have perceived repeated violations of O.C.G.A. § 16-13-30(b) with narcotic drugs (for which a life sentence is mandated) as a greater threat to the public health, safety, and welfare than repeated violations with nonnarcotic drugs. Hailey v. State, 263 Ga. 210, 429 S.E.2d 917 (1993), cert. denied, 510 U.S. 1048, 114 S. Ct. 700, 126 L. Ed. 2d 667 (1994).

No violations based on a high percentage of African-Americans convicted. — O.C.G.A. § 16-13-30 does not violate due process or equal protection based on statistical evidence as to the high percentage of African-Americans serving life sentences for drug offenses, nor because it creates an irrational sentencing scheme. Stephens v. State, 265 Ga. 356, 456 S.E.2d 560, cert. denied, 516 U.S. 849, 116 S. Ct. 144, 133 L. Ed. 2d 90 (1995).

Constitutionality of subsections (b) and (d). — No evidence supported contention that provision mandating life sentence for the second conviction of unlawful possession of a controlled substance with intent to distribute has been unconstitutionally enforced selectively against young, impoverished blacks. Hall v. State, 262 Ga. 596, 422 S.E.2d 533 (1992), cert. denied, 507 U.S. 1055, 113 S. Ct. 1956, 123 L. Ed. 2d 660 (1993); Hailey v. State, 263 Ga. 210, 429 S.E.2d 917 (1993), cert.

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denied, 510 U.S. 1048, 114 S. Ct. 700, 126 L. Ed. 2d 667 (1994).

Subsection (d) not retroactive. — O.C.G.A. § 16-13-30(d), granting trial courts greater discretion in sentencing, is not retroactive to offenses committed prior to the effective date of that section. *Mikell v. State*, 231 Ga. App. 85, 498 S.E.2d 531 (1998).

Discriminatory enforcement of section. — When the defendant produced, from several sources, various statistics, articles, and charts showing that blacks are more likely to be imprisoned for drug offenses than are whites, but did not offer any evidence specific to the defendant's own case that would support an inference that racial considerations played a part in the prosecution's decision to charge the defendant, the defendant's statistics failed to prove an essential element necessary in a selective prosecution case, i.e., that the prosecution engaged in a deliberate selective process of enforcement based on race. *Cain v. State*, 262 Ga. 598, 422 S.E.2d 535 (1992).

Defendant's claim that the mandatory life imprisonment provision was applied in a racially discriminatory manner was not properly supported since no evidence was offered that (1) blacks in general or (2) defendant in particular had been selectively prosecuted. *Anderson v. State*, 218 Ga. App. 872, 463 S.E.2d 502 (1995).

Construed with O.C.G.A. § 17-10-7. — Both O.C.G.A. §§ 16-13-30(d) and 17-10-7 give direction as to the imposition of punishment under specified aggravated circumstances; however, O.C.G.A. § 16-13-30(d) increases the maximum from 15 years to life for the subsequent offense, whereas O.C.G.A. § 17-10-7 does not increase the maximum but adds weight in favor of its imposition. *Wainwright v. State*, 208 Ga. App. 777, 432 S.E.2d 555 (1993).

O.C.G.A. § 16-13-30(d) is interpreted as providing that, although the court may not sentence second time offenders under both O.C.G.A. §§ 16-13-30(d) and 17-10-7(a), it may sentence second time offenders under both § 16-13-30(d) and any remaining provisions of § 17-10-7.

Blackwell v. State, 237 Ga. App. 896, 516 S.E.2d 787 (1999).

Because O.C.G.A. § 17-10-7 is the only recidivist provision that governs the situation where a defendant, who has a prior felony conviction for armed robbery, is subsequently convicted of a felony for selling cocaine, the trial court correctly applied that section in sentencing defendant. *Harden v. State*, 239 Ga. App. 700, 521 S.E.2d 829 (1999).

In a prosecution for sale of cocaine, the court was not required to impose a life sentence upon the defendant who had five previous drug convictions. The court retained the discretion either to impose any sentence within the statutory mandatory minimum and maximum sentence range or else to impose a life sentence. *Scott v. State*, 248 Ga. App. 542, 545 S.E.2d 709 (2001).

Since the defendant was found guilty of possessing cocaine with the intent to distribute, the defendant's third conviction for the possession of a controlled substance with the intent to distribute and the defendant's ninth felony conviction, the sentencing judge had the discretion to sentence the defendant under O.C.G.A. § 16-13-30(d) to "any sentence within the statutory mandatory minimum and maximum sentence range or else to impose a life sentence" and was not required to sentence the defendant to life imprisonment under O.C.G.A. § 17-10-7(a). *Mann v. State*, 273 Ga. 366, 541 S.E.2d 645 (2001).

After the defendant entered a guilty plea to possession of cocaine with intent to distribute, and the state introduced copies of a prior out-of-state drug conviction and a prior federal drug conviction, the trial court erred in sentencing defendant to 30 years under O.C.G.A. §§ 16-13-30(d) and 17-10-7(a). *Papadoupalos v. State*, 249 Ga. App. 300, 548 S.E.2d 59 (2001).

Because the defendant's conviction on count one of the indictment was the second conviction for violating O.C.G.A. § 16-13-30(b), selling a controlled substance, the trial court was not prohibited from sentencing the defendant under both O.C.G.A. §§ 16-13-30(d) and 17-10-7(c). *Johnson v. State*, 259 Ga. App. 452, 576 S.E.2d 911 (2003).

Trial court's decision to probate a portion of the sentence imposed on the defendant for the defendant's second conviction for possession of cocaine with intent to distribute, requiring the defendant to serve only seven years, was in direct contravention to O.C.G.A. § 16-13-30(d), which stated specifically that a second time offender was to have been imprisoned for not less than 10 years; by the plain reading of § 16-13-30(d), a defendant must have served at least 10 years in prison, and O.C.G.A. § 17-10-7(c), which applied to a second offense under § 16-13-30(b), required that the time be served without parole. *State v. Jones*, 265 Ga. App. 493, 594 S.E.2d 706 (2004).

Trial court did not err in stacking two recidivist sentencing provisions by first sentencing defendant to life in prison under former O.C.G.A. § 16-13-30(d), which at the time of defendant's crime and sentencing required a life sentence for repeat offenders of § 16-13-30(b), and by then sentencing defendant to life without parole under O.C.G.A. § 17-10-7(c), which required that upon conviction of a fourth felony, defendant was not eligible for parole. *Butler v. State*, 277 Ga. App. 57, 625 S.E.2d 458 (2005).

Court of Appeals properly affirmed the imposition of a life sentence without parole against the defendant, as a recidivist, under both O.C.G.A. §§ 16-13-30(d) and 17-10-7(c), as the defendant was convicted and sentenced before the effective date of the 1996 amendment to O.C.G.A. § 16-13-30(d), thus making a life sentence the only sentence that the trial court could impose; further, because the instant felony conviction was the defendant's fourth, O.C.G.A. § 17-10-7(c) applied to the sentence by operation of subsection (e) of that statute, as enacted in 1994, so as to require the defendant to serve the sentence imposed by the trial court without the possibility of parole. *Butler v. State*, 281 Ga. 310, 637 S.E.2d 688 (2006).

Upon the conviction for the sale of cocaine, the trial court properly sentenced the defendant under O.C.G.A. § 17-10-7(c) and not O.C.G.A. § 17-10-1(a)(1), to the minimum sentence of ten years imprisonment under O.C.G.A. § 16-13-30(d), without the possibility of parole, as the defen-

dant had three prior felony convictions. *Fortson v. State*, 283 Ga. App. 120, 640 S.E.2d 693 (2006).

Because sufficient proof of the necessary prior convictions, even without inclusion of the defendant's first offender plea, existed to authorize punishment under both O.C.G.A. §§ 16-13-30 and 17-10-7, the recidivist sentence imposed by the trial court was upheld. *Johnson v. State*, 284 Ga. App. 724, 644 S.E.2d 544 (2007), cert. denied, 2007 Ga. LEXIS 538 (Ga. 2007).

Trial court properly denied the defendant's plea withdrawal motion as the court fully informed the defendant that the sentence the court intended on imposing would be without parole, despite failing to advise the defendant of the sentence prior to the acceptance of the plea; moreover, as methamphetamine was a Schedule II non-narcotic drug, the more general provisions of O.C.G.A. §§ 16-13-30(e) and 17-10-7, and not O.C.G.A. § 16-13-30(c), applied. *Thomas v. State*, 287 Ga. App. 500, 651 S.E.2d 801 (2007).

Defendant's sentence of 30 years without parole for trafficking in cocaine was a sentence allowed under O.C.G.A. § 16-13-30(d), and hence, not illegal or void. Defendant could not have been sentenced under O.C.G.A. § 17-10-7(a), or defendant's sentence would have been 40 years. Because the sentence was not void, it was not subject to modification under O.C.G.A. § 17-10-1(f). *State v. Blue*, 304 Ga. App. 471, 696 S.E.2d 692 (2010).

Construed with O.C.G.A. § 16-13-31. — Most reasonable interpretation of the legislative intent in enacting O.C.G.A. § 16-13-31(f)(1) was to supplant the general punishment provision of O.C.G.A. § 16-13-30(b) with a specific and potentially more harsh punishment provision for manufacturing methamphetamine. *Richards v. State*, 290 Ga. App. 360, 659 S.E.2d 651 (2008).

Trial court did not err in imposing a sentence under O.C.G.A. § 16-13-31(f) rather than O.C.G.A. § 16-13-30(b) for defendant's convictions for trafficking methamphetamine and possessing methamphetamine because the rule of lenity was inapplicable since violations of both O.C.G.A. §§ 16-13-30(b) and 16-13-31(f)

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were classified as felonies. *Poole v. State*, 302 Ga. App. 464, 691 S.E.2d 317 (2010).

Legislative intent behind O.C.G.A. § 16-13-30(d) and the purpose for the statute's enactment is to deter repeat offenders of certain drug crimes enumerated in subsection (b) and to segregate persons who have two convictions of such offenses from the rest of society for an extended period of time. *Mays v. State*, 200 Ga. App. 457, 408 S.E.2d 714 (1991).

The 1996 amendment of O.C.G.A. § 16-13-30(d) giving the trial court greater discretion in imposing a lesser sentence than life was not retroactive. *Maddox v. State*, 227 Ga. App. 602, 490 S.E.2d 174 (1997).

Trial court erred in imposing mandatory life sentences for crimes committed in 1997, that is, after the legislative enactment making a life sentence discretionary. *Moton v. State*, 242 Ga. App. 397, 530 S.E.2d 31 (2000).

Special probation. — Plain language of O.C.G.A. § 42-8-35.2(a) requires that a term of special probation be served “in addition to any term of imprisonment” rendered under O.C.G.A. § 16-13-30(d); thus, the two statutes do not conflict. Accordingly, a defendant was properly sentenced to a ten-year incarceration followed by special probation, and the defendant's claim that O.C.G.A. § 42-8-32.5 was implicitly repealed by the 1996 amendment to O.C.G.A. § 16-13-30 was without merit. *Mike v. State*, 290 Ga. App. 214, 659 S.E.2d 664 (2008).

Subsection (b) must be violated for life sentence to be mandatory. — Trial court erred in imposing life sentences upon counts two, three, and four of the indictment when a defendant must have been convicted of violating O.C.G.A. § 16-13-30(b) in order for the imposition of a life sentence to be mandatory. *Brown v. State*, 204 Ga. App. 794, 420 S.E.2d 823 (1992).

Motion to modify sentence inappropriate remedy. — Defendant's claim that the trial court did not give defendant credit for time defendant spent in pretrial confinement when the court sentenced defendant after defendant pled guilty to

charges of possession of cocaine with intent to distribute and possession of marijuana with intent to distribute was cognizable only in a mandamus or injunction action against the Commissioner of the Georgia Department of Corrections, or in a petition for habeas corpus, not in a motion to modify defendant's sentence, and the trial court properly dismissed defendant's motion to modify defendant's sentence. *Maldonado v. State*, 260 Ga. App. 580, 580 S.E.2d 330 (2003).

With regard to the defendant's conviction for attempted possession of oxycodone with the intent to distribute and the sentence imposed of 30 years confinement as a recidivist, to serve 20 years in confinement and the remainder probated, the defendant was entitled to resentencing as the state conceded that the state failed to show that the defendant's prior convictions were adjudged upon the advice of counsel or following a waiver thereof. *Woodall v. State*, 291 Ga. App. 484, 662 S.E.2d 549 (2008).

Life sentence for conviction of a second offense. — Life sentence for conviction of a second offense was permissible when defendant had not been convicted of the first offense at the time defendant committed the second offense. *Hailey v. State*, 263 Ga. 210, 429 S.E.2d 917 (1993), cert. denied, 510 U.S. 1048, 114 S. Ct. 700, 126 L. Ed. 2d 667 (1994); *Key v. State*, 226 Ga. App. 240, 485 S.E.2d 804 (1997).

Life sentence based on conviction under prior statute. — O.C.G.A. § 16-13-30(d) authorizes a life sentence only for a second violation of the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., which was enacted in 1974. Thus, it does not include earlier convictions for crimes which would have been violations of the Act had they been committed after the effective date of the Act. *Smith v. State*, 193 Ga. App. 365, 387 S.E.2d 648 (1989).

Prior conviction under federal law. — Life sentence may only be imposed for a second violation of the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., and was not authorized since the prior offense used against the defendant was a federal drug conviction. *Query v. State*, 217 Ga. App. 61, 456 S.E.2d 704 (1995).

Defendant, sentenced to life under O.C.G.A. § 16-13-30(d) was not similarly situated to codefendant granted first offender probation for equal protection purposes because the codefendant was a first offender and defendant was convicted of seven other drug charges in addition to the sale of 200 grams or more of cocaine and had prior convictions for robbery and possession of cocaine with intent to distribute. *Bell v. State*, 252 Ga. App. 74, 555 S.E.2d 747 (2001).

Career offender implications. — Defendant's conviction for possessing a counterfeit substance with intent to sell under O.C.G.A. § 16-13-30(i) was an offense under a state law that prohibited the possession of a counterfeit substance, and was punishable by imprisonment for a term exceeding one year; as such, the elements of the offense matched the plain language of U.S. Sentencing Guidelines Manual §§ 4B1.1 and 4B1.2, and the offense was sufficient to count towards defendant's career offender status. Moreover, this interpretation was not modified by the statutory definitions contained in 21 U.S.C. § 802(7), and nothing in 28 U.S.C. § 994 prevented the sentencing commission from using the commission's authority in this manner. *United States v. Smith*, 2005 U.S. App. LEXIS 25382 (11th Cir. Nov. 23, 2005) (Unpublished).

Prior out-of-state convictions. — Defense counsel was not ineffective for failing to object to the trial court's use of prior felonies defendant committed in California to sentence the defendant as a recidivist under O.C.G.A. § 17-10-7(c) as the elements of Cal. Health & Safety Code §§ 11054(f), 11350(a) (possession of cocaine) were sufficiently similar to those of O.C.G.A. §§ 16-13-26(1)(D), 16-13-30(c); and the elements of Cal. Penal. Code § 211 (robbery) were sufficiently similar to those of O.C.G.A. § 16-8-40. *Williams v. State*, 296 Ga. App. 270, 674 S.E.2d 115 (2009).

Nonfinal conviction of first offense as predicate for life sentence on second charge. — O.C.G.A. § 17-10-2(a), relating to presentence hearings, did not operate to bar the trial court from relying on one of the cocaine charges to which defendant pled guilty in a guilty plea

hearing in order to impose an enhanced mandatory life sentence pursuant to O.C.G.A. § 16-13-30(d) for the second sale of cocaine charge to which defendant pled guilty at the same hearing. Plea bargain negotiations can serve the same purpose as the giving of notice under O.C.G.A. § 17-10-2(a), and, when plea bargain negotiations are conducted, the defendant can be given "clear notice" of what the state intends to rely upon in aggravation of sentencing at the guilty plea hearing. *Martin v. State*, 207 Ga. App. 861, 429 S.E.2d 332 (1993).

In order for the imposition of life sentences to be mandatory pursuant to O.C.G.A. § 16-13-30(d), a defendant's prior conviction need not have preceded the defendant's subsequent violations of O.C.G.A. § 16-13-30(b), but the defendant's prior conviction must necessarily have preceded the defendant's subsequent trial for violating O.C.G.A. § 16-13-30(b). *State v. Sears*, 202 Ga. App. 352, 414 S.E.2d 494 (1991).

Prior conviction trigger for mandatory life sentence. — Defendant's conviction for the more serious offense of trafficking in cocaine under O.C.G.A. § 16-13-31 was sufficient in conjunction with the defendant's previous conviction for possession of cocaine with intent to distribute under O.C.G.A. § 16-13-30(b) to trigger the mandatory life sentence provisions of O.C.G.A. § 16-13-30(d) and the state gave proper notice that the prior conviction would be used in aggravation at sentencing pursuant to O.C.G.A. § 16-13-30(d). *Brundage v. State*, 231 Ga. App. 478, 499 S.E.2d 408 (1998).

Life sentence appropriate. — When there is evidence of record that the defendant was properly notified of the state's intent to use defendant's prior drug convictions in aggravation of punishment at the sentencing hearing, and such evidence was not sufficiently rebutted by defendant, the trial court did not err in sentencing defendant to life in prison as a recidivist. *Washington v. State*, 216 Ga. App. 352, 454 S.E.2d 214 (1995).

Defendant's conviction for the more serious offense of trafficking in cocaine under O.C.G.A. § 16-13-31 was sufficient in conjunction with prior convictions for sale of

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cocaine to trigger the mandatory life sentence provision of O.C.G.A. § 16-13-30(d). *Covington v. State*, 231 Ga. App. 851, 501 S.E.2d 37 (1998).

Life sentence cannot be imposed for a first offense even though, at the time a conviction is entered on that offense, the defendant had committed and been convicted of an intervening offense. *Mays v. State*, 262 Ga. 90, 414 S.E.2d 481 (1992).

Recidivist punishment under subsection (d) not precluded by § 17-10-7(c). — Imposition of mandatory life sentences as recidivist punishment for convictions under each count of an indictment charging six separate offenses of selling cocaine was not precluded by provisions of the statute placing limitations on the use of prior convictions as the basis for imposing enhanced recidivist punishment. *McCoy v. State*, 210 Ga. App. 672, 437 S.E.2d 366 (1993).

Neither of two concurrent convictions can serve as the predicate for the imposition of a life sentence (under O.C.G.A. § 16-13-30(d)) as to the other. *State v. Sears*, 202 Ga. App. 352, 414 S.E.2d 494 (1991).

Rehabilitation and life sentence. — There appears to be no constitutional requirement that a defendant receive “the benefit of rehabilitation” before a life sentence for repeated conduct may be imposed under O.C.G.A. § 16-13-30(d). *Beasley v. State*, 202 Ga. App. 349, 414 S.E.2d 663 (1991).

Neither convictions could serve basis for life imprisonment. — Concurrent six-year sentences imposed upon defendant were not void, and the state’s appeal was dismissed, since neither of defendant’s instant convictions could serve as the predicate for the imposition of a life sentence as to the others. *State v. Sampson*, 203 Ga. App. 396, 417 S.E.2d 34, cert. denied, 203 Ga. App. 907, 417 S.E.2d 34 (1992).

Use of second offense to revoke first-offender probation. — Trial court did not err in treating the defendant’s commission of the second offense both as the basis for the revocation of defendant’s

first-offender probation which, in turn, resulted in defendant’s conviction of the original offense, and as the “second or subsequent offense” for which O.C.G.A. § 16-13-30 mandates a life sentence. *Dean v. State*, 200 Ga. App. 752, 409 S.E.2d 667, cert. denied, 200 Ga. App. 895, 409 S.E.2d 667 (1991).

Notice required for life term. — If a life sentence is to be imposed under O.C.G.A. § 16-13-30(d), the state must notify defendant of any conviction the state intends to use in aggravation of punishment pursuant to that section. *Armstrong v. State*, 264 Ga. 237, 442 S.E.2d 759 (1994).

Notice to the defendant that two prior convictions would be used against the defendant was timely where notice was given on the day of trial, but before the trial started. *Howard v. State*, 234 Ga. App. 260, 506 S.E.2d 648 (1998).

Written notice that the state intends to present evidence of prior convictions coupled with oral notice that the state intends to seek a life sentence satisfies the notice requirement. *Washington v. State*, 238 Ga. App. 561, 519 S.E.2d 234 (1999).

Advance notice not required. — O.C.G.A. § 16-13-30 contains no requirement of advance notice of prior felony convictions as a condition to sentencing or to receiving evidence of prior drug conviction. *Armstrong v. State*, 209 Ga. App. 796, 434 S.E.2d 560 (1993).

Advising on sentencing. — In a prosecution for possession of methamphetamine, the defendant claimed defense counsel was ineffective for failing to advise the defendant of the possibility of receiving a prison sentence without the possibility of parole. This claim failed as the trial court was entitled to believe trial counsel’s testimony that counsel advised the defendant of this possible sentence before the defendant elected to go to trial. *Matthews v. State*, 294 Ga. App. 836, 670 S.E.2d 520 (2008).

Indictment sufficient. — Trial court’s decision overruling the defendant’s special demurrer to an indictment charging the defendant with trafficking in methamphetamine and misdemeanor possession of marijuana in violation of O.C.G.A. §§ 16-13-30(b) and 16-13-31(e)

was authorized because the allegations of the indictment were sufficient to be easily understood by the jury, to allow the defendant to prepare the defendant's defense, and to protect the defendant from double jeopardy; the indictment sufficiently set forth the date of the offenses and tracked the material language of the statutes proscribing the charged offenses, and the language set forth in the counts against the codefendants separately designated the drugs upon which those charges were based and made clear that the defendant's drug charges were not based upon the drugs allegedly possessed by those individual codefendants. *Fyfe v. State*, 305 Ga. App. 322, 699 S.E.2d 546 (2010).

Waiver of error in indictment. — Trial court did not err in permitting the state to try the defendant on both the sale of cocaine and trafficking in cocaine charge, after the prosecutor informed the defendant that the defendant would only be tried for the sale offense, and after the trial court excluded evidence of the trafficking crime as a similar transaction; by failing to object, the defendant waived any alleged error. *Brockington v. State*, 265 Ga. App. 13, 592 S.E.2d 858 (2003).

No fatal variance in indictment. — It was not a fatal variance to prosecute the defendants for possession of amphetamine when the indictment alleged possession of methamphetamine. The defendants were well aware of the misnomer and were not surprised at trial since their defense was that the substance belonged to a codefendant, and the defendants were not subject to further prosecution for possession of amphetamine. *Howard v. State*, 291 Ga. App. 289, 661 S.E.2d 644 (2008).

Indictment not final when pre-trial notice given. — When the defendant's conviction on the first count of the instant four count indictment for violations of the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., was not final at the time the state gave the state's pre-trial notice of the state's intent to seek a mandatory life sentence, the conviction on the first count could not be the basis for the imposition of a life sentence on either of the remaining counts of the indictment. *Nunnally v. State*, 203 Ga. App. 639, 417 S.E.2d 170, cert. denied, 203 Ga. App. 907,

417 S.E.2d 170 (1992).

Jury instructions on lesser included offense. — Instructions on the elements of the offense of possession of cocaine with intent to distribute and on the lesser included offense of simple possession given in the language of the Suggested Pattern Jury Charge were sufficient. *Burse v. State*, 232 Ga. App. 729, 503 S.E.2d 638 (1998).

Defendant was properly convicted of trafficking in methamphetamine in violation of O.C.G.A. § 16-13-31(e) because the trial court did not commit reversible error by refusing to charge the jury on the lesser included offense of simple possession of methamphetamine, O.C.G.A. § 16-13-30, when there was no written request to give a charge on simple possession; even if the trial court erred in not giving the charge, reversal was not required in light of the overwhelming evidence that defendant possessed 432.31 grams of methamphetamine, which clearly constituted trafficking, and, therefore, it was highly unlikely that the failure to give an instruction on simple possession contributed to the verdict. *Gonzalez v. State*, 299 Ga. App. 777, 683 S.E.2d 878 (2009).

Trial court's failure to charge the jury on manufacturing methamphetamine, O.C.G.A. § 16-13-30(a), as a lesser included offense of trafficking methamphetamine, O.C.G.A. § 16-13-31(f), did not contribute to the verdict and was harmless; although the trial court was required to charge the jury on § 16-13-30(b) as a lesser included offense to § 16-13-31(f) since there was evidence that the defendant manufactured methamphetamine as prohibited by § 16-13-30(b), there was no relevant distinction between the two statutes with regard to methamphetamine as applied to the case. Because the evidence established that the defendant manufactured methamphetamine, and the defendant's admission that the defendant was "cooking" showed that the defendant knowingly manufactured methamphetamine, the jury could have found the defendant guilty of both offenses or not guilty of both. *Poole v. State*, 302 Ga. App. 464, 691 S.E.2d 317 (2010).

Trial counsel was not deficient for failing to object to the trial court's instruction

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on the lesser included offense of possession of MDMA (Ecstasy) because the instruction explained the elements of possession of MDMA with intent to distribute and delineated that charge from simple possession of MDMA; the charge substantially covered the principles in the defendant's request to charge and adequately instructed the jury as to the jury's consideration of the charged offense and the lesser offense, and since there was overwhelming evidence of the defendant's guilt, in that the defendant possessed a distribution amount of MDMA, the defendant could not show a reasonable probability that the outcome of the defendant's trial would have been different. *Taylor v. State*, 306 Ga. App. 175, 702 S.E.2d 28 (2010).

Evidence sufficient for conviction of manufacturing marijuana. — See *Holland v. State*, 205 Ga. App. 695, 423 S.E.2d 694 (1992).

When verdict sustained. — If the totality of the evidence is sufficient to connect defendant to possession of drugs, even though there is evidence to authorize a contrary finding, the jury's verdict will be sustained. *Singleton v. State*, 194 Ga. App. 5, 389 S.E.2d 496 (1990).

Possession with intent to distribute is not punishable by both fine and imprisonment. — General Assembly has not seen fit to permit imposition of both fine and imprisonment as punishment for a felony, except in specified cases, and possession of phencyclidine with intent to distribute is not one of these. *Taylor v. State*, 149 Ga. App. 362, 254 S.E.2d 432 (1979).

Unauthorized fines are void part of sentence. — When defendants violated O.C.G.A. § 16-13-30(b) by possessing with intent to distribute diazepam, a Schedule IV controlled substance, the trial court was without authority to impose a \$5,000 fine on one defendant and \$10,000 fines on each of the other defendants since O.C.G.A. § 16-13-30(h) does not authorize imposition of any fines; since a trial judge may only fix a sentence within the limits prescribed by law, the fines imposed are void and must be

stricken from the respective sentences. *Castillo v. State*, 166 Ga. App. 817, 305 S.E.2d 629 (1983).

Defendant's sentence for cocaine possession requiring the defendant to begin making monthly payments on fines, fees, and court costs during the defendant's incarceration was a punishment that the law did not allow, and therefore was void. Pursuant to O.C.G.A. § 17-10-8, the defendant could only be ordered to make such payments as a condition of probation. *Crane v. State*, 302 Ga. App. 422, 691 S.E.2d 559 (2010).

Juvenile court erred in imposing a fine for possession of cocaine because a fine was not an authorized penalty under O.C.G.A. § 16-13-30. *In re A. T.*, 302 Ga. App. 713, 691 S.E.2d 642 (2010).

Monetary fines not authorized on conviction. — Upon conviction of a defendant of possession of cocaine with intent to distribute, the trial court was without authority to impose a fine, penalty fee, and D.A.T.E. fee; the penalty for the offense does not include monetary fines. *Rawls v. State*, 210 Ga. App. 408, 436 S.E.2d 527 (1993).

Fine of \$50,000 was not authorized upon a conviction of a violation of O.C.G.A. § 16-13-30. *Donelson v. State*, 220 Ga. App. 688, 469 S.E.2d 861 (1996).

Phrase "subsequent offense" in O.C.G.A. § 16-13-30(g) means possession of any controlled substance rather than "a controlled substance in Schedule III, IV, or V." *Ray v. State*, 181 Ga. App. 42, 351 S.E.2d 490 (1986).

Repeat offenders. — It was not error to sentence defendant as a repeat offender rather than under O.C.G.A. § 16-13-30, where first offense involved possession and control of a controlled substance, and second offense involved possession with intent to distribute. *Sewell v. State*, 162 Ga. App. 483, 291 S.E.2d 783 (1982).

Enhanced punishment based upon prior conviction. — If the state has not specifically informed the defendant, prior to trial, that it intends to seek enhanced punishment based upon a conviction for a prior offense, the trial court would not be able to impose an enhanced sentence, even if the offense for which the defendant is being tried is a "second or subsequent

offense.” *Mays v. State*, 262 Ga. 90, 414 S.E.2d 481 (1992); *Jordan v. State*, 217 Ga. App. 420, 457 S.E.2d 692 (1995).

Previous convictions not final at the time a sentence was imposed because they were on appeal could not be relied upon as grounds for imposing enhanced punishment. *Dunn v. State*, 208 Ga. App. 197, 430 S.E.2d 50 (1993); *Covington v. State*, 226 Ga. App. 484, 486 S.E.2d 706 (1997).

Categorical approach was properly applied in determining that a defendant's prior conviction under O.C.G.A. § 16-13-30 was a “controlled substance offense” for purposes of the career offender guideline, U.S. Sentencing Guidelines Manual § 4B1.1; although the defendant received less than the statutory minimum sentence under O.C.G.A. § 16-13-30, the state court record showed that the defendant was convicted of selling cocaine, not possessing cocaine. *United States v. Partee*, No. 09-2548, 2010 U.S. App. LEXIS 10687 (7th Cir. May 26, 2010) (Unpublished).

Date of commission of offense determines applicability of enhanced punishment. — It is not the date of conviction which determines the applicability of enhanced punishment but the date of the commission of the offense; where conviction was for offense which occurred prior to offense which resulted in prior conviction, trial court erred in imposing enhanced punishment under subsection (d). *Doe v. State*, 205 Ga. App. 322, 422 S.E.2d 558 (1992).

Second conviction for sale of cocaine results in sentence of imprisonment for life, even when the prior offense is not set out in the indictment, when the state complies with the requirement of O.C.G.A. § 17-10-2(a), which provides that only such evidence in aggravation as the state has made known to the defendant prior to defendant's trial shall be admissible. *State v. Hendrixson*, 251 Ga. 853, 310 S.E.2d 526 (1984).

Sentenced for a second offense of cocaine possession. — Defendant's previous conviction for cocaine possession with the intent to distribute constituted a previous conviction for cocaine possession that triggered the mandatory 30-year sentencing for a second simple possession

offense under O.C.G.A. § 16-13-30(c). *Smiley v. State*, 241 Ga. App. 712, 527 S.E.2d 585 (2000).

Life sentence for trafficking in cocaine. — Life sentence was properly imposed on the defendant after the defendant was convicted of trafficking in cocaine under O.C.G.A. § 16-13-31. *Howard v. State*, 234 Ga. App. 260, 506 S.E.2d 648 (1998).

Life sentence based on conviction in another state. — Imposition of the life sentence was erroneous when defendant's prior conviction was under South Carolina law and thus did not invoke the provisions of O.C.G.A. § 16-13-30(d). *Peterson v. State*, 212 Ga. App. 147, 441 S.E.2d 481 (1994).

Prior nolo contendere plea considered at sentencing. — Defendant's prior conviction stemming from plea of nolo contendere could be considered in sentencing the defendant under O.C.G.A. § 16-13-30. *James v. State*, 209 Ga. App. 389, 433 S.E.2d 700 (1993).

Probation as punishment. — Punishments provided in O.C.G.A. § 16-13-30 do not preclude probation as a punishment. *Lester v. State*, 190 Ga. App. 59, 378 S.E.2d 364 (1989).

Sentence for attempted possession appropriate. — Trial court did not err in sentencing defendant, who had been convicted of attempted possession of crack cocaine, for purchasing a piece of a nut from an undercover police officer thinking it was crack cocaine, within the sentencing range for attempted possession of a Schedule II controlled substance, despite the fact that the indictment did not specifically allege that crack cocaine was a Schedule II controlled substance. The indictment and proof clearly showed that defendant had in fact attempted to purchase a Schedule II controlled substance. *Lovain v. State*, 253 Ga. App. 271, 558 S.E.2d 812 (2002).

Fine as condition of probation. — When a defendant was convicted of possession of cocaine with intent to distribute under O.C.G.A. § 16-13-30 and sentenced to the mandatory minimum of 10 years' imprisonment, plus 30 years on probation, the trial court did not err in imposing a \$5,000 fine as a condition of probation.

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O.C.G.A. § 17-10-8 permitted a trial court to impose a fine as a condition of probation. *Marshall v. State*, 291 Ga. App. 284, 661 S.E.2d 662 (2008).

Sentence within authorized range.

— Defendant's sentence to five years of confinement to be probated after 12 months, payment of fines, a monthly probation fee, and submission to special conditions of probation was well within the range authorized for possession of cocaine and was not cruel and unusual punishment. *Toth v. State*, 213 Ga. App. 247, 444 S.E.2d 159 (1994).

When a defendant was sentenced to five years imprisonment for possession of cocaine, the sentence was within the statutory limits of two to 15 years, and was not so overly severe or excessive as to shock the conscience. *Palmore v. State*, 236 Ga. App. 285, 511 S.E.2d 624 (1999).

Defendant's sentence of 30 years with five years to serve and 25 years on probation for selling cocaine was within the limits set by O.C.G.A. § 16-13-30(d) and would not be disturbed. *Harden v. State*, 239 Ga. App. 700, 521 S.E.2d 829 (1999).

Since defendant, as a fourth-time felon, faced a maximum punishment of 30 years in prison with no possibility of parole, and the trial court sentenced defendant to 25 years in prison with no possibility of parole, defendant's sentence was within the statutory guidelines; accordingly, the sentence was not void. *Taylor v. State*, 261 Ga. App. 248, 582 S.E.2d 209 (2003).

Appellate court declined to review the defendant's 30-year sentence because the sentence was within the statutory guidelines; the defendant had been found guilty of possessing cocaine with the intent to distribute, the state introduced three prior felony convictions in aggravation of sentencing pursuant to O.C.G.A. § 17-10-2(a), and given the defendant's prior drug convictions and the mandate of O.C.G.A. § 17-10-7(c), the defendant faced a maximum punishment of life in prison under O.C.G.A. § 16-13-30(d). *Jackson v. State*, 284 Ga. App. 619, 644 S.E.2d 491 (2007), cert. denied, No. S07C1169, 2007 Ga. LEXIS 521 (Ga. 2007).

Defendant misconstrued the language in O.C.G.A. § 16-13-30(d) when the defendant contended that a prior conviction for the sale of marijuana was improperly used to enhance defendant's sentence for a first conviction for possession with intent to sell amphetamine; the defendant's sentence of 30 years with 20 to serve was within the range set out for a conviction for possession with intent to sell amphetamine. *McElreath v. State*, 284 Ga. App. 349, 643 S.E.2d 863 (2007).

Because the defendant's conviction was the second for possession of cocaine, the defendant was subject to a sentence of between 5 and 30 years under O.C.G.A. § 16-13-30(c), and the trial judge's sentence of 25 years, with eight years to serve, was within the legal range of punishment. *Shook v. State*, 300 Ga. App. 59, 684 S.E.2d 129 (2009).

Trial court did not err in vacating the defendant's sentence of 40 years confinement and resentencing the defendant as a recidivist to 20 years confinement because there was nothing in the record showing that the trial court failed to exercise the court's discretion when the court imposed the sentence; the 20-year sentence the trial court imposed on resentencing was within the court's discretion, as the sentence fell within the statutory limits for the offense for which the defendant was convicted, possession of cocaine with intent to distribute. *Bush v. State*, 305 Ga. App. 617, 699 S.E.2d 899 (2010).

Life sentence neither discriminatory nor disproportionate. — Mandatory life sentence for second violation of O.C.G.A. § 16-13-30 did not violate defendant's equal protection or due process rights, nor was it disproportionate. *Jackson v. State*, 223 Ga. App. 471, 477 S.E.2d 893 (1996).

Trial court lacked discretion to suspend, probate or defer sentence.

— When the defendant was twice convicted of selling cocaine, the trial court correctly held that the court lacked discretion to suspend, probate, or defer a portion of the defendant's life sentence. *Mosley v. State*, 203 Ga. App. 275, 416 S.E.2d 736, cert. denied, 203 Ga. App. 907, 416 S.E.2d 736 (1992).

Defendant held sentenced beyond statutory maximum. — See *Smith v.*

State, 186 Ga. App. 303, 367 S.E.2d 573 (1988).

Maximum sentence appropriate. — Because conspiracy to manufacture methamphetamine was a crime penalized by a special law, the general provisions of the penal code did not apply; thus, under both O.C.G.A. §§ 16-13-30 and 16-13-33, which were mutually exclusive, defendant was properly sentenced to 30 years, which was the maximum sentence allowed. *McWhorter v. State*, 275 Ga. App. 624, 621 S.E.2d 571 (2005).

Merger of sentences by operation of law. — Convictions for possession of methamphetamine and criminal attempt to manufacture methamphetamine merged as a matter of fact since the state used the same conduct to establish commission of both crimes, namely the same methamphetamine oil found in a toilet; therefore, though it was permissible to prosecute defendant for each crime, defendant could not be convicted for both offenses and the possession conviction and sentence were vacated by operation of law on appeal. *Womble v. State*, 290 Ga. App. 768, 660 S.E.2d 848 (2008).

Merger of convictions. — Defendant's conviction for manufacturing marijuana in violation of O.C.G.A. § 16-13-30(j)(1) should have been merged into the defendant's conviction for trafficking in marijuana in violation of O.C.G.A. § 16-13-31(c) because the same evidence was used to prove both crimes, and the manufacturing count did not require proof of any fact which the trafficking count did not require. *Preval v. State*, 302 Ga. App. 785, 692 S.E.2d 51 (2010).

Waiver of notice required for life term. — Error by the trial court in imposing a life sentence when the defendant was not given formal notice prior to trial of the state's intent to demand recidivist punishment was waived by the defendant's failure to object at the time the state introduced the defendant's prior drug conviction into evidence during the presentencing phase of the trial. *Tillman v. State*, 217 Ga. App. 269, 457 S.E.2d 228 (1995).

Term of 30-years imprisonment for sale of cocaine was not an abuse of discretion because, even though O.C.G.A.

§ 17-10-7(a) was not applicable, such term was within the statutory limits. *Covington v. State*, 231 Ga. App. 851, 501 S.E.2d 37 (1998).

Banishment. — It was proper for the trial court to banish the defendant from all areas of Georgia north of Interstate 20 after the defendant pled guilty to possession of cocaine. The sentence allowed the defendant to receive rehabilitative services while at the same time removing the defendant from an area where the defendant committed the defendant's prior crimes and presumably had access to illegal drugs. *Shook v. State*, 300 Ga. App. 59, 684 S.E.2d 129 (2009).

Rule of lenity inapplicable. — Trial court did not err in failing to apply the rule of lenity because both of the defendant's offenses, trafficking in methamphetamine and misdemeanor possession of marijuana, O.C.G.A. §§ 16-13-30(e) and 16-13-31(b), were classified as felonies, and thus, the rule of lenity did not apply. *Fyfe v. State*, 305 Ga. App. 322, 699 S.E.2d 546 (2010).

Search and Seizure

Anonymous tip serving as basis for investigatory stop. — An investigative stop of the defendant's automobile which resulted in seizure of narcotics and the defendant's arrest did not violate the Fourth Amendment when the anonymous tip which formed the basis for the stop had been sufficiently corroborated by the arresting officer's recognition of the defendant as having been involved in an earlier drug investigation so as to furnish reasonable suspicion that the defendant was engaged in criminal activity. *State v. Ball*, 207 Ga. App. 729, 429 S.E.2d 258 (1993).

Scope of consent. — Given that a police officer was granted consent to search the defendant's hotel room to search for the victim's stolen truck keys, upon the officer's receipt of an inconclusive response that a set of keys found could belong to the victim, a continued search, which yielded methamphetamine, was reasonable, and did not exceed the original scope of consent granted; thus, the trial court did not err in denying the defendant's motion to suppress the drug evidence that officers found as a result of a

Search and Seizure (Cont'd)

continued search. *Shuler v. State*, 282 Ga. App. 706, 639 S.E.2d 623 (2006).

Invalid consent. — Any implied consent by the defendant emptying the defendant's own pockets while one officer had the officer's stungun pointed at the defendant rendered the "consent" invalid. *State v. Williams*, 281 Ga. App. 187, 635 S.E.2d 807 (2006).

Oxycodone found in the glove box of a car was inadmissible because the oxycodone was discovered pursuant to a consent search that was the product of an unauthorized traffic stop. The officer had no reasonable suspicion to justify stopping the defendants other than that the defendants' car was "out of place" at an empty truck stop parking lot. *Groves v. State*, 306 Ga. App. 779, 703 S.E.2d 371 (2010).

Pat-down search exceeded permissible scope. — Because the state introduced no evidence that the defendant consented to an officer's opening of a matchbox retrieved from the defendant's pants, the officer was not concerned that a weapon was hidden in the box, and the box was not readily identifiable as contraband, the search of the defendant's person exceeded the permissible scope of a pat-down for weapons, requiring suppression of the cocaine found inside the matchbox. *Mason v. State*, 285 Ga. App. 596, 647 S.E.2d 308 (2007).

Safety frisk justified. — Trial court properly denied the defendant's motion to suppress the contraband found on the defendant's person as a result of a traffic stop that came to fruition after an officer observed the defendant making a U-turn in front of a recently robbed bank because the defendant admitted to having a knife in the defendant's pocket but refused to remove the defendant's hand therefrom. As a result, the police were justified in frisking the defendant for safety reasons and the contraband was, therefore, legally obtained from the defendant. *Johnson v. State*, 289 Ga. App. 27, 656 S.E.2d 161 (2007).

Vehicle stop for seatbelt violation. — When the officer testified that the officer had a clear and unobstructed view of the driver of the vehicle not wearing a seat

belt, this view was sufficient to establish probable cause for the stop, and once the vehicle was lawfully stopped, the officer was allowed to ask for the driver's consent to search the car. *State v. Milsap*, 243 Ga. App. 519, 528 S.E.2d 865 (2000).

With regard to a defendant's convictions for possession of methamphetamine with intent to distribute, possession of a firearm during the commission of a drug offense, and carrying a concealed weapon, the trial court properly denied the defendant's motion to suppress the items seized from the defendant's vehicle and the defendant's person after a traffic stop as the defendant's failure to wear a seatbelt and to have insurance on the vehicle justified the traffic stop. Thereafter, after being released from the traffic stop and being asked to come back, the defendant consented to the search of the vehicle and of the defendant's person, which led to the seizure of the contraband. *Hughes v. State*, 293 Ga. App. 404, 667 S.E.2d 163 (2008).

Vehicle stop due to broken taillight.

— Trial court properly denied a defendant's motion to suppress the evidence of drug contraband found in the defendant's vehicle after the vehicle was stopped due to a broken taillight as the officers had the right to detain the defendant while awaiting word as to possible outstanding warrants; a certified drug recognition expert questioned the defendant and observed the defendant having bloodshot eyes, droopy eyelids, and displaying relaxed inhibitions; and the defendant sufficiently and voluntarily consented to the search of the vehicle as was shown on a videotape of the traffic stop, despite the defendant being handcuffed at the time. *Maloy v. State*, 293 Ga. App. 648, 667 S.E.2d 688 (2008).

Investigatory detention to search for weapon.

— After the subject of an investigative stop at an airport admitted the presence of a weapon, and the officers then removed that subject to the airport precinct for further investigation, the detention was reasonable under the circumstances, and evidence uncovered of illegal possession of a controlled substance during a subsequent search conducted with the subject's voluntary consent was improperly suppressed. *State v. Crisanti*,

220 Ga. App. 705, 470 S.E.2d 314 (1996).

Probable cause for arrest. — Police search of a defendant's bag and person, which produced handguns, cocaine, cash, and other drugs was lawful because the search was made pursuant to the police officers' lawful warrantless arrest of the defendant when the defendant arrived at a motel room exactly answering a detailed description provided by a confidential informant, who stated that the defendant would be carrying a shoulder bag containing drugs and a loaded handgun. *Green v. State*, 302 Ga. App. 388, 691 S.E.2d 283 (2010).

Defendant's motion for independent expert to examine seized substances rejected. — Trial court did not err in refusing to grant a continuance to allow an independent expert chemist of defendant's choice sufficient time to analyze the seized controlled substances and testify at trial since the defendant did not move to have this expert appointed until after the trial had commenced, the earliest possible time the expert could testify would be the end of the week, and the court expected the trial to be over by that time, but expressed the court's willingness to appoint someone else who would not unduly delay the trial. *Dixon v. State*, 180 Ga. App. 222, 348 S.E.2d 742 (1986).

Shared curtilage affects admissibility. — It is confusing to combine the concepts of "common area" and "curtilage" in deciding whether a particular area adjoining an apartment building is entitled to protection; therefore, the test should be the reasonableness of the resident's expectation of privacy and the officer's reasons for being in the yard. *Espinoza v. State*, 265 Ga. 171, 454 S.E.2d 765 (1995).

Evidence was not within the curtilage shared by two units in a duplex where it was not found in the hallway leading to both units or in the front yard between two driveways leading to the dwelling. Because the evidence was located in the yard outside the driveway leading to defendant's unit, an area where defendant had a reasonable expectation of privacy, i.e., a part of the curtilage of defendant's unit, for which police did not have a search warrant, the evidence should have been suppressed. *Espinoza v. State*, 265

Ga. 171, 454 S.E.2d 765 (1995).

Wooded area not part of curtilage. — In woods 50 yards from the defendant's home, police found items used to manufacture methamphetamine under a tarp. The wooded area where the contraband was found was not so closely tied to the defendant's home as to warrant protection as curtilage under the Fourth Amendment. *Minor v. State*, 298 Ga. App. 391, 680 S.E.2d 459 (2009).

Use of a trained drug detection dog. — Record supported the trial court's judgment that a vehicle checkpoint that was established to check drivers' licenses, registrations, and proof of insurance was established for a legitimate purpose, that a police officer did not violate defendant's rights when the officer walked a drug detection dog around defendant's car while another officer was checking the validity of defendant's driver's license, and that police had probable cause to search defendant's car after the dog alerted on it, and the trial court properly denied a motion to suppress evidence which defendant filed after defendant was charged with trafficking in cocaine and possession of cocaine with intent to distribute, and convicted defendant of both offenses. *McCray v. State*, 268 Ga. App. 84, 601 S.E.2d 452 (2004).

Search for heroin or cocaine prior to arrest. — Totality of circumstances provided sufficient probable cause to arrest and search defendant at airport for possession of heroin or cocaine, and fact that search preceded arrest rather than vice versa was not particularly important where formal arrest followed quickly on heels of search. *Berry v. State*, 163 Ga. App. 705, 294 S.E.2d 562 (1982).

Entrapment. — Defendant's testimony, corroborated by a paid informant, established a prima facie case of entrapment. There was no evidence introduced that, prior to the defendant's entrapment, defendant had a predisposition to deliver, sell, distribute, or knowingly possess cocaine as forbidden by O.C.G.A. § 16-13-30(b). Since the state failed to introduce evidence to rebut the affirmative defense of entrapment, the defendant was entitled to a directed verdict of acquittal. *Hill v. State*, 261 Ga. 377, 405 S.E.2d 258 (1991).

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Ineffective assistance of counsel claim dismissed despite defendant's claim or working with police. — After the defendant was convicted of selling cocaine, the trial court did not err in denying the defendant's claim of ineffective assistance of counsel since the defendant failed to show that counsel did not adequately prepare for trial or that counsel's performance was deficient and that such deficiency prejudiced the defendant's defense that the defendant was working with the police and had made the sale as part of an attempt to catch another drug dealer. *Sullivan v. State*, 259 Ga. App. 708, 578 S.E.2d 277 (2003).

Nervousness in the presence of police officers does not provide reasonable articulable suspicion. — When officers testified the officers observed a black male exit a breeze way known for drug sales and walk in a hurried fashion toward the male's car, becoming nervous when seeing the officers, this activity does not amount to the reasonable articulable suspicion required for a Terry stop. *Peters v. State*, 242 Ga. App. 816, 531 S.E.2d 386 (2000).

Nervousness inadequate for prolonging detention. — As an officer did not detain a defendant for an unreasonable length of time after a traffic stop, the fact that the defendant's nervousness alone did not provide the officer with reasonable suspicion to prolong the detention was immaterial as the defendant consented to a search of the defendant's vehicle. As there was no Fourth Amendment violation, methamphetamine and drug paraphernalia found during the search did not have to be suppressed. *McKnight v. State*, 296 Ga. App. 38, 673 S.E.2d 573 (2009).

Traffic stop concluded. — After issuing a courtesy warning ticket for a seatbelt violation to defendant, the traffic stop was concluded and defendant's continued detention was excessive because the officer's testimony did not establish reasonable suspicion of criminal activity. *State v. Cunningham*, 246 Ga. App. 663, 541 S.E.2d 453 (2000).

Traffic stop not unreasonably prolonged. — After an officer stopped a de-

fendant for speeding at 3:32 a.m., the officer was given two different names for the defendant's intoxicated teenaged passenger; neither name was in the system. As the officer testified that in 90 percent of the cases, this meant that there was an outstanding warrant, suspension, probation, or parole, the officer had reasonable grounds to prolong the traffic stop; therefore, the methamphetamine the officer found in a consent search of a box hidden under defendant's leg did not have to be suppressed. *Matthews v. State*, 294 Ga. App. 836, 670 S.E.2d 520 (2008).

As an officer's questioning of the defendant, after a traffic stop, about the defendant's length of time in Georgia was done to determine whether the defendant was in compliance with O.C.G.A. §§ 40-2-8(a) and 40-5-20(a), and did not unreasonably prolong the stop, the defendant's rights under U.S. Const., amend. IV were not violated. Therefore, methamphetamine seized from the defendant's purse during the stop did not have to be suppressed. *Sommese v. State*, 299 Ga. App. 664, 683 S.E.2d 642 (2009).

State trooper's request to search a defendant's vehicle after telling the defendant that the defendant was free to go did not unreasonably prolong the detention and did not violate the defendant's Fourth Amendment rights. Therefore, the four pounds of marijuana found during the search was not subject to suppression. *Davis v. State*, 303 Ga. App. 785, 694 S.E.2d 696 (2010).

Search of vehicle incident to arrest for driving under suspension. — Though central dispatch advised an officer that the defendant had not been served with notice of suspension of the defendant's license, the officer had probable cause to arrest the defendant for driving under suspension (O.C.G.A. § 40-5-121) as the officer had no way of knowing whether the defendant had obtained actual or constructive notice of the suspension by other means. Thus, drugs found in a search of the defendant's car incident to the arrest were admissible; the trial court's ultimate conclusion that the defendant did not have notice of the suspension did not "retroactively vitiate" the probable cause supporting the arrest. *Johnson v.*

State, 297 Ga. App. 254, 676 S.E.2d 884 (2009).

Initial approach of vehicle justified.

— Officers' initial approach of defendant's vehicle and request for consent to search were warranted, even without an articulable suspicion of criminal activity at the time of their approach; moreover, even if a reasonable articulable suspicion of criminal activity had been required to briefly detain defendant, the officers had such suspicion upon seeing: (1) individuals approach defendant's car in an area known for drug activity; (2) the individuals turn and walk away upon seeing the police; and (3) defendant's passenger swallowing what appeared to be a crack rock as the police approached. *Sego v. State*, 279 Ga. App. 484, 631 S.E.2d 505 (2006).

Consent search during sobriety roadblock. — With regard to a defendant being charged with possessing drugs, the trial court properly denied the defendant's motion to suppress the drugs found in the defendant's vehicle during a sobriety roadblock as the roadblock was legal and the defendant voluntarily consented to the search. *Britt v. State*, 294 Ga. App. 142, 668 S.E.2d 461 (2008).

Passenger's behavior provided reasonable suspicion and consent search authorized. — In a prosecution for possession of methamphetamine and hydrocodone, a passenger, when questioned by police, was fidgety and nervous, stuttered, would not make eye contact, and fell after exiting the car. The passenger's behavior gave police reasonable suspicion to believe that the passenger had taken drugs, which justified the police in detaining the passenger and the defendant (who was the driver) while the police conducted a consent search of the car, which belonged to the passenger's boss. *Robinson v. State*, 295 Ga. App. 136, 670 S.E.2d 837 (2008), cert. denied, No. S09C0622, 2009 Ga. LEXIS 211 (Ga. 2009).

Defendant never withdrew consent to search. — With regard to a defendant's conviction for possession of methamphetamine, the trial court properly denied the defendant's motion to suppress the drugs found on the defendant's person as the

police obtained the defendant's consent to search the defendant's person and the defendant's failure to produce all of the items from the defendant's pockets did not amount to a withdrawal of the consent to search. *Allison v. State*, 293 Ga. App. 447, 667 S.E.2d 225 (2008).

Group search. — Trial court erred in granting the defendant's motion to suppress evidence of contraband, namely, defendant's possession of marijuana, as police officer's discovery of the marijuana was not pursuant to an impermissible pat-down search that two other officers conducted on a group of students, including the defendant, but was pursuant to the defendant's invitation for the officer to search the defendant after the officer asked the defendant why the defendant's license had been suspended; however, a remand was necessary to determine whether the defendant's consent to search was voluntarily given. *State v. Baker*, 261 Ga. App. 258, 582 S.E.2d 133 (2003).

Consent of probationer to search.

— When officers went to a defendant's residence to conduct a probation search based on a tip that the defendant was involved with drugs as the defendant willingly led the officers to a concealed gun, and voluntarily furnished a urine sample that tested positive for methamphetamine, the defendant gave valid consent to the search, which eliminated the need for either probable cause or a search warrant under U.S. Const., amend. IV. *Brooks v. State*, 285 Ga. 424, 677 S.E.2d 68 (2009).

Failure to file timely motion. — In a prosecution for possession of cocaine with intent to distribute, because the defendant failed to voice an objection at trial regarding an inaccuracy in a search warrant affidavit as to the precise location of the alleged cocaine sale which served as the basis of the charge, but instead raised the objection for the first time in a motion for a new trial, the objection was late; thus, the appellate court's review of the motion was waived. *Jackson v. State*, 281 Ga. App. 368, 636 S.E.2d 34 (2006).

Suppression motion improperly granted. — Because the evidence gathered while the defendant's residence was under surveillance, including the contents

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of the defendant's garbage as well as an officer's specific testimony regarding marijuana residue found on a piece of plastic wrap, supported a finding of probable cause necessary to justify the issuance of a search warrant for the defendant's residence, suppression of the evidence seized as a result of the execution of the search warrant was improper. *State v. Davis*, 288 Ga. App. 164, 653 S.E.2d 311 (2007).

Possession

Unlawful possession of any controlled substance, regardless of amount, constitutes an offense. *Scott v. State*, 170 Ga. App. 409, 317 S.E.2d 282, aff'd, 253 Ga. 147, 317 S.E.2d 830 (1984).

Possession not included in crime of manufacturing. — Possession of marijuana is not a necessary element of the crime of knowingly manufacturing marijuana by cultivating or planting, and so misdemeanor possession is not a lesser offense included in the crime of manufacturing as a matter of law. *Galbreath v. State*, 213 Ga. App. 80, 443 S.E.2d 664 (1994); *Hunt v. State*, 222 Ga. App. 66, 473 S.E.2d 157 (1996).

Possession included in offense of possession with intent to distribute. — Offense of possession of marijuana was a lesser included offense of the offense of possession of marijuana with intent to distribute, where the possession charge could be established by proof of a less culpable mental state (general criminal intent) than was required to establish the commission of possession with intent to distribute (specific criminal intent to distribute). *Talley v. State*, 200 Ga. App. 442, 408 S.E.2d 463 (1991).

Possession of marijuana is a lesser included offense of the offense of possession of marijuana with intent to distribute as a matter of law. *Hardeman v. State*, 216 Ga. App. 165, 453 S.E.2d 775 (1995).

Conspiracy to possess marijuana with intent to distribute is not a lesser included offense of possession. *Rowe v. State*, 181 Ga. App. 492, 352 S.E.2d 813 (1987).

Prima facie case of unlawful possession of controlled substance. — If

state proves that the defendant possessed controlled substance in a container without a label indicating a valid prescription, the state has established a prima facie case and shifts to the defendant the burden of going forward with evidence showing that the defendant's possession was under a valid prescription or that the defendant was otherwise exempted from the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq. *Nix v. State*, 135 Ga. App. 672, 219 S.E.2d 6 (1975).

Head of household presumption of possession of contraband found therein is no longer a viable presumption in Georgia. *Ramsay v. State*, 175 Ga. App. 97, 332 S.E.2d 390 (1985).

Evidence of apartment "ownership" held sufficient. — Defendant's convictions for trafficking in cocaine and possession of heroin with intent to distribute was sustained even though the evidence connecting the defendant to the apartment was circumstantial. *Williams v. State*, 262 Ga. App. 67, 584 S.E.2d 625 (2003).

Cash as proof of intent to distribute. — It was not error to admit into evidence \$390 in cash found on defendant at the time of defendant's arrest for possessing heroin with intent to distribute, where defendant was unemployed, and there was testimony that the packets of heroin defendant dropped by defendant's feet were the size packets that sold for 10 to 20 dollars and the money found in defendant's possession was in denominations of mostly 10 and 20 dollar bills. Such evidence would tend to show that defendant had been selling heroin and that defendant intended to distribute the packages of heroin in defendant's possession. Thus, the money had probative value in determining the issue of intent. *Houston v. State*, 180 Ga. App. 267, 349 S.E.2d 228 (1986).

While a defendant was presumed to be in possession of cocaine found in a car that the defendant owned, the defendant argued the presumption was rebutted by evidence that others in the car had equal access to the drugs. As the defendant also possessed \$494 in cash, the jury was not compelled to find the presumption of possession rebutted; therefore, the evidence,

including testimony that the number of bags of cocaine found was inconsistent with personal consumption, was sufficient to convict the defendant of possession of cocaine with intent to distribute in violation of O.C.G.A. § 16-13-30(b). *Hamilton v. State*, 293 Ga. App. 297, 666 S.E.2d 630 (2008).

Allegation that the defendant “unlawfully,” possessed cocaine was sufficient to encompass both the intent to commit the proscribed act and the knowledge necessary to form that intent. *Dye v. State*, 177 Ga. App. 813, 341 S.E.2d 469 (1986), overruled on other grounds, *Eason v. State*, 260 Ga. 445, 396 S.E.2d 492 (1990), overruled on other grounds, *State v. Lucious*, 271 Ga. 361, 518 S.E.2d 677 (1999).

Prescription drugs prescribed for another. — Nothing in the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., authorizes possession of controlled substances that allegedly were prescribed for someone other than the defendant but were not in the prescription container when found in the possession of the defendant. *Black v. State*, 194 Ga. App. 660, 391 S.E.2d 432 (1990).

Evidence sufficient to prove oxycodone pills were controlled substance. — Testimony from experts in drug identification that, based on the fact that the logo on pills found in the defendant’s possession matched that of pharmaceutically prepared oxycodone tablets, the pills were oxycodone, was sufficient to allow a reasonable jury to conclude that the defendant possessed that controlled substance. *Kessinger v. State*, 298 Ga. App. 479, 680 S.E.2d 546 (2009).

Multiple offenses for simultaneous possession. — Defendant may be prosecuted, convicted, and separately sentenced for the simultaneous possession of each of the controlled substances listed in O.C.G.A. § 16-13-26. *Tabb v. State*, 250 Ga. 317, 297 S.E.2d 227 (1982).

Sole or joint possession. — Law recognizes that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons shared actual or constructive possession of a thing, possession is joint. *Anderson v.*

State, 166 Ga. App. 459, 304 S.E.2d 550 (1983).

Although a probationer’s boyfriend claimed ownership to methamphetamine found in a tin in the probationer’s dresser drawer, the trial court, as the finder of fact, was entitled to believe that testimony while disbelieving a professed exclusive ownership of the methamphetamine; moreover, the fact that the tin was found in the probationer’s dresser drawer provided more than a mere spatial connection between the probationer and this particular contraband. *Giang v. State*, 285 Ga. App. 491, 646 S.E.2d 710 (2007).

Evidence sufficient to prove constructive, joint possession. — When police officers in execution of a no-knock search warrant on the home where the teenage defendant lived with defendant’s mother found a sock with cocaine in the sock floating in a toilet of a bathroom that defendant had exited, defendant’s cousin acknowledged seeing defendant with the sock earlier and suspecting drugs were in the sock, and the officers also found marijuana and crack cocaine in a cigar box that defendant admitted owning during an earlier detention hearing, the evidence was sufficient to prove the defendant was in constructive, joint possession of the drugs. *In re R.S.*, 253 Ga. App. 409, 559 S.E.2d 143 (2002).

By showing circumstantially that the defendant and two codefendants had equal access to the cocaine and marijuana in the defendant’s truck, the evidence established that all three were parties to the crime and, thus, guilty of joint constructive possession of the drugs under O.C.G.A. §§ 16-13-2(b) and 16-13-30(b). *Davis v. State*, 270 Ga. App. 777, 607 S.E.2d 924 (2004).

Defendant’s conviction for possession of marijuana was affirmed as an accomplice testified that the accomplice and the defendant smoked a substance and that it was marijuana; having smoked the substance repeatedly and with it only inches away from the defendant in the glove compartment, the defendant had the power and intention to exercise dominion or control over the marijuana and to have constructively and jointly possessed it with the accomplice. *Michael v. State*, 281 Ga. App. 289, 635 S.E.2d 790 (2006).

Possession (Cont'd)

Despite the defendant's contrary claim, the state presented sufficient evidence that the defendant and the codefendants had joint constructive possession of the contraband seized, and that the jury could reject the defendant's equal access defense, given that: (1) some of that contraband was found in a bedroom in which the defendant slept and underneath the defendant's mattress; and (2) a large amount of cash was found in the defendant's purse. *Castillo v. State*, 288 Ga. App. 828, 655 S.E.2d 695 (2007).

There was sufficient evidence to support the defendants' convictions for trafficking in cocaine and possession of less than one ounce of marijuana because the evidence established that the contraband was found in a shoe under the driver's seat of the van the defendants were traveling in, and sufficient circumstantial evidence proved that the defendant driver had the power and intention to exercise dominion or control over the cocaine and marijuana based on that defendant's driving of the van at the time of the traffic stop. There was sufficient circumstantial evidence to establish that the defendant occupant had the power and intention to exercise dominion or control over the cocaine and marijuana found in the van based on that defendant's conflicting story given to the police with regard to what the defendants were doing and the fact that a smoking pipe that tested positive for cocaine was found on that defendant's person. *Woodard v. State*, 289 Ga. App. 643, 658 S.E.2d 129 (2008), cert. denied, No. S08C1061, 2008 Ga. LEXIS 475 (Ga. 2008).

Because the codefendant testified and identified the defendant as the owner of the cocaine at issue, and because the defendant was standing next to the cocaine in plain view, evidence presented at trial was sufficient to support defendant's joint and constructive possession of the cocaine; moreover, defendant's act of pointing to evidence that the codefendant had equal access to the cocaine was of no consequence as the equal access doctrine did not apply to those charged with being in joint constructive possession of contra-

band. *Slade v. State*, 289 Ga. App. 877, 658 S.E.2d 439 (2008).

There was sufficient evidence to support defendant's conviction for possession of methamphetamine as the state produced evidence connecting the defendant to methamphetamine oil found in a toilet by more than spatial proximity since the evidence showed that the production of methamphetamine oil was a final stage in the process of manufacturing methamphetamine in a form suitable for sale and personal use, and officers recognized the strong odor of the methamphetamine manufacturing process permeating the house where defendant was located along with methamphetamine oil. *Womble v. State*, 290 Ga. App. 768, 660 S.E.2d 848 (2008).

When the defendants, a married couple who were in a car with a third person, were charged with trafficking in cocaine, possession of cocaine with intent to distribute, possession of amphetamine, and possession of a firearm during certain crimes, there was sufficient evidence that the defendants had joint constructive possession of a duffel bag in which drugs and a weapon were found. The evidence showed that one spouse exercised control over the car that transported the contraband and that the other spouse tried to retrieve a paper sack inside the duffel bag at the sheriff's office with suspicious and inconsistent explanations. *Howard v. State*, 291 Ga. App. 289, 661 S.E.2d 644 (2008).

Even if others had access to cocaine found in a kitchen, a jury could infer that a defendant had joint constructive possession of the cocaine since the evidence showed that the defendant had been seen earlier in the day with 15 bags of cocaine that the defendant said the defendant planned to sell that day, that when the police came to execute a warrant on an alleged drug dealer's house the defendant ran into the house where the defendant was found in the kitchen with seven bags of cocaine and a heated pot of grease containing three additional "hits," and that the defendant was the only one in the kitchen. *Riley v. State*, 292 Ga. App. 202, 663 S.E.2d 835 (2008).

Defendant's convictions for trafficking

in methamphetamine and possession of cocaine were upheld on appeal as the jury was authorized to find that the defendant constructively possessed the contraband since the defendant lived at the apartment searched by consent and despite the fact that others living in the apartment had equal access to the drugs. Additionally, the defendant was found lying on a mattress atop a bag containing more than an ounce of methamphetamine. *Maldonado v. State*, 293 Ga. App. 356, 667 S.E.2d 156 (2008).

Two intruders entered a house through a window, threatened the occupants with handguns, and stole over an ounce of marijuana from the house. As defendant was found trapped behind the steering wheel of the get-away vehicle after the vehicle crashed while fleeing a patrol car (the intruders having fled), the evidence was sufficient to establish that the defendant and the intruders were in joint, constructive possession of the marijuana. *Olds v. State*, 293 Ga. App. 884, 668 S.E.2d 485 (2008).

Evidence was sufficient to support two defendants' convictions for constructive possession of methamphetamine, in violation of O.C.G.A. § 16-13-30(a), since, according to an accomplice, the codefendants and the accomplice smoked methamphetamine inside a vehicle prior to a police stop. The accomplice's testimony was corroborated by observations of the investigating officers. *Davenport v. State*, 308 Ga. App. 140, 706 S.E.2d 757 (2011).

Evidence sufficient to prove constructive, joint possession but not sufficient to prove intent to distribute. — With regard to a defendant's convictions for possession of marijuana with the intent to distribute, trafficking in 4-Methylenedioxymethamphetamine, commonly known as ecstasy, trafficking in cocaine, and possession of a firearm during the commission of a crime, there was sufficient evidence to support the defendant's conviction for possession of the contraband, which was found in a backpack, based on the strong odor of marijuana coming from the vehicle in which the defendant was a passenger, the defendant's suspicious and nervous behavior,

the defendant's joint living arrangement with two other defendants, the defendant's possession of ammunition for another one of the defendant's weapons, and the fact that the defendant was, at times, within arm's reach of the backpack, which showed an intent and power to exercise joint control over the backpack and the drugs found therein; likewise, there was sufficient evidence to support the trafficking charges based on the amounts of the contraband found; and, there was sufficient evidence to support the firearm possession charge since the defendant was found in possession of a magazine that fit the gun located within arm's reach. However, considering that there were four people in the vehicle, the court found that the state's evidence was insufficient to exclude the reasonable hypothesis that the marijuana was intended for personal use, therefore, the conviction for the intent to distribute marijuana was reduced to possession. *Vines v. State*, 296 Ga. App. 543, 675 S.E.2d 260 (2009).

Actual or constructive possession.

— Person who knowingly has direct physical control over a thing at a given time is in actual possession of the thing. A person who, though not in actual possession, knowingly has both the power and intention at a given time to exercise dominion or control over a thing is then in constructive possession of the thing. *Anderson v. State*, 166 Ga. App. 459, 304 S.E.2d 550 (1983).

Possession of marijuana may be actual or constructive, and the evidence is sufficient to support a conviction for possession where it would authorize a jury to find that defendant, at the very least, was in constructive possession of marijuana, since defendant exercised dominion and control over it. *Hadden v. State*, 181 Ga. App. 628, 353 S.E.2d 532 (1987).

Possession sufficient to sustain a conviction pursuant to O.C.G.A. § 16-13-30(b) may be either actual or constructive. *Walton v. State*, 194 Ga. App. 490, 390 S.E.2d 896 (1990).

Neither actual nor constructive possession of cocaine is an element of the offense of selling of cocaine. *Evans v. State*, 235 Ga. App. 577, 510 S.E.2d 313 (1998).

Defendant's motion for a directed ver-

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dict of acquittal on a charge of possession of cocaine with intent to distribute was properly denied; the evidence establishing defendant's constructive possession of cocaine included defendant's presence in the room where it was found, defendant's actual possession of a key to the apartment where it was found and \$346.00 in cash, testimony by another individual at the scene that the individual and defendant were partners in the drug trade, and defendant's giving a false name when police arrived. *Jackson v. State*, 276 Ga. App. 694, 624 S.E.2d 270 (2005).

As the officer heard a bag that contained dime bags of marijuana fall from where the defendant, who was in custody, was walking and where a later search of the defendant revealed empty baggies, the circumstantial evidence tended to prove the offense of possession with intent to distribute marijuana under O.C.G.A. § 16-13-30 and the state was not required to tender the illegal drugs at trial. In the *Interest of P.M.H.*, 277 Ga. App. 643, 627 S.E.2d 211 (2006).

Although the defendant claimed that at least 10 others were within throwing distance of the pouch containing cocaine, sufficient evidence supported the defendant's conviction of possession of cocaine and possession of less than one ounce of marijuana under O.C.G.A. § 16-13-30; the pouch was found between the defendant's legs, and the labels found in the pouch tied the defendant to the marijuana cigarettes found in the defendant's car given that they were the same type of labels. *Pierre v. State*, 281 Ga. App. 69, 635 S.E.2d 363 (2006).

Sufficient evidence established the defendant's possession of the cocaine under O.C.G.A. § 16-13-30; a deputy found the cocaine in the area where the other deputy saw it fly from the defendant's window during a chase of the defendant's vehicle, and this was sufficient for the jury to conclude that the cocaine belonged to defendant. *Florence v. State*, 282 Ga. App. 31, 637 S.E.2d 779 (2006).

Defendant's possession of cocaine conviction was upheld on appeal as supported by the sufficiency of the evidence given: (1)

an officer's act of observing a hand emerge from the passenger window and toss out a bag of cocaine; (2) that, based on the officer's testimony, it would have been physically impossible for the driver of the vehicle to toss out the bag while driving the car; and (3) the evidence showed that the defendant was the passenger and no other person was in the car; moreover, as witness credibility was the jury's province, the court found that a rational trier of fact could have found the defendant guilty of possession of cocaine beyond a reasonable doubt. *Johnson v. State*, 283 Ga. App. 425, 641 S.E.2d 655 (2007).

Sufficient evidence of constructive possession of crack cocaine was presented to convict a defendant under O.C.G.A. § 16-13-30(b) based on the facts that plastic baggies containing a large amount of crack cocaine were found in an apartment bathroom shortly after the defendant fled there and closed the door; and numerous similarities existed between other items found under the tub and items found in the defendant's pockets. *Marshall v. State*, 295 Ga. App. 354, 671 S.E.2d 860 (2008).

Neither actual nor constructive possession shown. — When the only evidence relating to defendant was that the defendant and codefendants left a codefendant's apartment together in a codefendant's car, that a codefendant was carrying a bag containing drugs when the codefendant left the codefendant's apartment that was found on the floor in front of the seat where a codefendant was riding, and there was no evidence that defendant even knew the bag was in the car, the evidence did not show actual possession by defendant; and a finding that defendant was in constructive possession of the contraband must be based upon some connection between the defendant and the contraband other than spatial proximity. The evidence was insufficient to support defendant's conviction of possession of the contraband. *Shirley v. State*, 166 Ga. App. 456, 304 S.E.2d 468 (1983).

Because there was no evidence connecting defendant with the cocaine found in a hotel room other than defendant's presence at a hotel and the fact that the room was registered in defendant's name, any presumption of possession was rebutted

as a matter of law. *Stringer v. State*, 275 Ga. App. 519, 621 S.E.2d 761 (2005).

At most, the evidence showed that cocaine in a bottle found in a yard near the defendant's home was in the possession of the defendant's son, who was seen throwing something into the yard as the officers approached to execute a search warrant; the trial court should have granted a directed verdict on the charge of possessing drugs with intent to distribute for the drugs in the bottle. *Smith v. State*, 278 Ga. App. 315, 628 S.E.2d 722 (2006).

Evidence was insufficient to prove that a defendant constructively possessed drugs as, even assuming that the defendant had been in a bedroom in which drugs were found, there was not sufficient evidence that the defendant exercised control over the drugs, or knew the drugs were present, since: (1) no contraband was found on or near the defendant's person; (2) the drugs were found inside a ball of electrical tape in a corner of the bedroom; (3) the home belonged to another person; and an officer believed that the other person resided in the bedroom, and (4) there was no evidence that the defendant resided on the premises, or that the defendant was seen in the bedroom in which the drugs were found. *Johnson v. State*, 282 Ga. App. 52, 637 S.E.2d 775 (2006).

Evidence was insufficient to show constructive possession of methamphetamine found in a car in which defendant was a passenger because there was no evidence, besides spatial proximity, connecting the defendant with the contraband since there was no evidence showing that the defendant knew that a baggy found in the car contained contraband or the defendant hid the baggy in the car. *Millsaps v. State*, 300 Ga. App. 383, 685 S.E.2d 371 (2009).

Trial court erred in finding that the defendant violated the defendant's probation by committing the new felony of possessing a controlled substance, piperazine or TFMPP, in violation of O.C.G.A. § 16-13-30 because the circumstantial evidence was insufficient to show the defendant's constructive possession of the TFMPP pills; the only evidence linking the defendant to the drugs was spatial proximity, but it was at least equally

likely that the pills belonged to the driver of the truck where the pills were found. *Scott v. State*, 305 Ga. App. 596, 699 S.E.2d 894 (2010).

Possession of cocaine found in passenger's pockets. — Evidence was sufficient to convict a defendant of being a party to the crime of possession of cocaine in violation of O.C.G.A. §§ 16-2-20(b) and 16-13-30(a), although the cocaine was found in the defendant's nephew's pockets, because the nephew was blind and could not have driven himself to locate the drugs or completed the purchase by himself. *Wade v. State*, 305 Ga. App. 819, 701 S.E.2d 214 (2010).

In vicinity of contraband. — Merely having been in the vicinity of contraband does not, without more, establish possession. *Ridgeway v. State*, 187 Ga. App. 381, 370 S.E.2d 216 (1988).

Evidence of possession of "portable" contraband near defendant's home. — Even if the equal access doctrine applied to marijuana plants growing in buckets near defendant's home, there was substantial other evidence of defendant's possession of the "portable" contraband, such as that defendant was linked to ownership of the containers in which some of the plants were growing, that some of the plant-filled buckets were on the boundaries of defendant's yard within feet of defendant's dog pen and defendant's garden, all visible from defendant's yard, and that defendant was a gardener and had a readily available water source. *Blitch v. State*, 188 Ga. App. 487, 373 S.E.2d 227, cert. denied, 188 Ga. App. 911, 373 S.E.2d 227 (1988).

Access to premises. — When the defendant made no affirmative showing that anyone other than the defendant and the defendant's spouse had actual access to the bedroom or the bedroom closet during several days or weeks prior to the discovery of the pills, the jury was authorized to find defendant guilty of the offense of unlawful possession of diazepam. *Prescott v. State*, 164 Ga. App. 671, 297 S.E.2d 362 (1982).

Evidence authorized a finding that the defendant and a codefendant were in joint constructive possession of the drugs in the bedroom that they were apparently shar-

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ing and in which the contraband was found. *Anderson v. State*, 166 Ga. App. 459, 304 S.E.2d 550 (1983).

Despite the defendant's denial of any knowledge of the existence of drugs and other contraband in a motel room in which the defendant was the sole occupant, evidence of the contraband found in close proximity to other evidence which the defendant admitted owning, when coupled with the fact that only one key to the room existed, which the defendant admitted to having, and that no one had brought anything into the room since the person the defendant alleged was the owner of the evidence had left, was sufficient to support the defendant's convictions under O.C.G.A. §§ 16-11-106, 16-13-31, 16-13-2, and 16-13-30. *Hall v. State*, 283 Ga. App. 266, 641 S.E.2d 264 (2007).

Evidence was sufficient to prove that two defendants knowingly possessed cocaine and marijuana found in a house to which the defendant's both had keys and where their belongings were located, as required by O.C.G.A. §§ 16-13-31(a) and 16-13-30(j)(1), although defendants did not own or rent the house. *Lott v. State*, 303 Ga. App. 775, 694 S.E.2d 698 (2010).

Equal access of others to premises.

— Evidence that cocaine was found hidden on the outside of the defendant's mobile home, which was parked in an area to which a large number of persons, not only visitors to the unit occupied by the defendant but anyone having business in the mobile home park, had potential access, without evidence directly connecting the defendant to the cocaine, was entirely circumstantial, and insufficient to sustain the defendant's conviction for possession of cocaine. *Prescott v. State*, 164 Ga. App. 671, 297 S.E.2d 362 (1982).

Defendant's conviction for unlawful possession of cocaine was reversed, where there was no evidence that defendant occupied the bedroom where the cocaine was found, and other persons living in the residence had equal access to the bedroom. *Nations v. State*, 177 Ga. App. 801, 341 S.E.2d 482 (1986); *Johnson v. State*, 245 Ga. App. 583, 538 S.E.2d 481 (2000).

When the state presented evidence that the defendant was a lessee and occupant of an apartment where cocaine was found there was a rebuttable presumption that the defendant had possession and evidence that others had access was not sufficient to rebut the presumption against the defendant. *Wilson v. State*, 231 Ga. App. 525, 499 S.E.2d 911 (1998).

Evidence was sufficient to convict defendant of possession of cocaine where a pipe used to smoke crack cocaine the night before was found in defendant's bedroom, even though defendant shared the house with other people, because additional evidence connected defendant to the pipe besides the fact that defendant used the room where it was found, as there was testimony that defendant actually possessed the crack and smoked it, and there was no evidence that anyone else had equal access to defendant's bedroom. *Whitlock v. State*, 265 Ga. App. 111, 593 S.E.2d 17 (2003).

Sufficient evidence overcame defendant's equal access defense as defendant's ownership or possession of a vehicle containing the seized methamphetamine was not the sole evidence establishing defendant's guilt of possession of methamphetamine; the state also relied on defendant's roommate's testimony that defendant purchased the seized methamphetamine and kept the methamphetamine in the vehicle. *Stovall v. State*, 275 Ga. App. 244, 620 S.E.2d 462 (2005).

Insufficient evidence supported the defendant's conviction of possession of marijuana under O.C.G.A. § 16-13-30; the defendant lived with a female, and there was no evidence presented in the case that connected the defendant to the small baggies of marijuana found hidden in a bag under the end table of the living room in the apartment. *Gentry v. State*, 281 Ga. App. 315, 635 S.E.2d 782 (2006), cert. denied, 2007 Ga. LEXIS 78 (Ga. 2007).

There was sufficient evidence to support a defendant's conviction on various drug possession charges based on the evidence of various drugs being found in the bedroom the defendant resided in of a two-bedroom apartment shared with another, despite others having equal access

to the apartment. *Smith v. State*, 297 Ga. App. 526, 677 S.E.2d 717 (2009).

Effect of equal access of others to premises. — Merely finding contraband on premises occupied by defendant is not sufficient to support conviction if it affirmatively appears from evidence that persons other than defendant had equal opportunity to commit the crime. *McCann v. State*, 137 Ga. App. 445, 224 S.E.2d 99 (1976); *Person v. State*, 155 Ga. App. 106, 270 S.E.2d 319 (1980); *Anderson v. State*, 166 Ga. App. 459, 304 S.E.2d 550 (1983).

Equal access rule generally applies to contraband in open, notorious, and easily accessible areas. *Wright v. State*, 154 Ga. App. 400, 268 S.E.2d 378, cert. denied, 449 U.S. 900, 101 S. Ct. 270, 66 L. Ed. 2d 130 (1980).

“Equal access” instruction not warranted. — Defendant was not entitled to an “equal access” instruction relating to drugs found in the defendant’s vehicle since, as there was no instruction on presumption of possession, that presumption was not placed before the jury, and since the defendant’s ownership of the vehicle was not the sole evidence of possession of cocaine with intent to distribute. *State v. Johnson*, 280 Ga. 511, 630 S.E.2d 377 (2006).

Because the state was not relying upon the defendant’s ownership or control of the residence in order to link the ownership and possession of the methamphetamine found to the defendant, a charge on equal access was not authorized by the evidence. *Thrasher v. State*, 289 Ga. App. 399, 657 S.E.2d 316 (2008).

In a defendant’s trial for possession of cocaine, the state did not rely on a presumption that the defendant possessed the cocaine, but presented direct evidence that the defendant exited a car with the drugs in a bag and disposed of the bag in the woods following an accident. Therefore, the defendant was not entitled to an equal access charge relative to the woods. *Hill v. State*, 302 Ga. App. 291, 690 S.E.2d 677 (2010).

Conviction not precluded when defendant connected with contraband. — Totality of the evidence was sufficient to connect the defendant to the possession of cocaine seized in a residence shared by

the defendant and the defendant’s girl friend even though the evidence would have authorized a finding that others had equal access to the drugs. *Lane v. State*, 177 Ga. App. 553, 340 S.E.2d 228 (1986).

When joint constructive possession alleged. — Equal access rule, conceptually and historically, has no application when all persons allegedly having equal access to the contraband are alleged to have been in joint constructive possession of that contraband. It is simply a defense available to the accused to whom a presumption of possession flows. *Castillo v. State*, 166 Ga. App. 817, 305 S.E.2d 629 (1983).

When state’s evidence is of actual, physical possession. — “Equal access” rule is inapplicable when the state’s evidence is not that the defendant constructively possessed contraband, but that the defendant actually and physically possessed the contraband. *Marshall v. State*, 153 Ga. App. 198, 264 S.E.2d 718 (1980).

Equal access rule inapplicable to marijuana plants growing outside. — While equal access rule may be applicable with reference to loose, portable quantities of contraband found inside house, it is not properly applicable to marijuana plants growing outside, which require a period of months to grow, mature, and be harvested. *Goode v. State*, 130 Ga. App. 791, 204 S.E.2d 526 (1974).

Equal access rule does not apply to cases involving marijuana plants growing on the land outside the owner’s or lessee’s residence, and not in portable containers, on the basis that such contraband is stationary. *Ward v. State*, 178 Ga. App. 129, 342 S.E.2d 373 (1986).

Equal access rule inapplicable where physical possession shown. — When a search warrant was executed, the defendant was found with a bucket of water into which the defendant was placing packets of foil, and a sampling of the packets showed the presence of cocaine, the rule that the mere presence of contraband on the premises occupied by an accused is insufficient to sustain a conviction when there is also evidence of access by others was not applicable, even though there was no proof that others had not put cocaine in the bucket. *Bradley v. State*,

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180 Ga. App. 386, 349 S.E.2d 263 (1986).

Chain of custody. — State failed to prove an adequate chain of custody because there was no evidence at trial that the plastic bag and the alleged cocaine were distinct items with readily observable distinguishing characteristics; fungible items require proof of chain of custody. *Phillips v. Williams*, 276 Ga. 691, 583 S.E.2d 4 (2003).

In a trial for possession of cocaine, it was not error to admit a substance into evidence when the only break in the chain of custody occurred after a scientist tested the substance and found the substance to be cocaine; even if there was error, it was harmless given the overwhelming evidence of guilt, including trial testimony and scientist's report, even without the substance being introduced into evidence. *Cowins v. State*, 290 Ga. App. 814, 660 S.E.2d 865 (2008).

Equal access defense was not sufficient. — Evidence that the defendant placed an object, which was later found to be crack cocaine, on the hood of a car, that two other men did not move, and then the defendant tried to flee after seeing the police, was sufficient for a jury to find that the defendant was not merely in close proximity to the drugs, but that the other men in the area did not have an equal opportunity to place the cocaine on the hood of the truck. *Daniels v. State*, 261 Ga. App. 5, 582 S.E.2d 4 (2003).

Evidence was sufficient to support defendant's conviction for possession of more than 28 grams of a mixture containing methamphetamine, as a search of defendant's vehicle after a lawful stop revealed the drug as well as paraphernalia, and the presumption of equal access between defendant and the passenger was overcome by defendant's voluntary statement that the drugs belonged to the defendant. *Collins v. State*, 273 Ga. App. 598, 615 S.E.2d 646 (2005).

There was sufficient evidence to support defendant's conviction for possession of marijuana with intent to distribute, because defendant drove a car into a parking lot, an individual who was empty-handed got into the vehicle and they drove to a

remote area of the lot, and thereafter, the individual exited the vehicle, as the presumption of the equal access rule was rebutted by police officers' observation that the individual was empty handed and that the marijuana which was found in defendant's vehicle was in a briefcase behind the passenger's seat; there was also sufficient other evidence that supported a finding that defendant possessed the marijuana. *Causey v. State*, 274 Ga. App. 506, 618 S.E.2d 127 (2005).

Even though the defendant did not own the home where methamphetamine and other contraband were found, and even though the defendant was not arrested with drugs or drug-related objects on the defendant's person, there was sufficient evidence to link the defendant to the contraband, including a codefendant's testimony that the defendant brought the drugs into the home and the defendant's statement to the police about the drug's location. *Tucker v. State*, 276 Ga. App. 117, 622 S.E.2d 466 (2005).

Evidence supported the defendant's conviction for possession of methamphetamine because: (1) the defendant acknowledged that an unoccupied tractor-trailer was defendant's; (2) the police entered the cab and saw in plain sight a crack cocaine or methamphetamine pipe; (3) testing of the pipe was positive for methamphetamine; (4) the defendant admitted that the defendant smoked methamphetamine in the pipe and had a "drug problem"; and (5) the equal access rule did not apply as the defendant made inculpatory admissions authorizing a finding that the defendant possessed the methamphetamine. *Rochefort v. State*, 279 Ga. 738, 620 S.E.2d 803 (2005).

Although the defendant contended that the trial court erred by denying the defendant's motion for a directed verdict of acquittal because presence in the vicinity of contraband did not establish possession, defendant and the codefendant were indicted and tried together for possession of methamphetamine, the jury was entitled to conclude that defendant was in possession of the methamphetamine-coated pipe, which was found in the car the defendant drove, next to the driver's seat; moreover, the jury heard the officer's

testimony that the defendant stated at arrest that the defendant was aware the item was used to smoke methamphetamine, and the trial court charged the jury on the doctrine of equal access. Thus, the jury was able to contemplate and reject the equal access defense, and sufficient evidence was presented for the jury to find that the defendant possessed the methamphetamine. *Dover v. State*, 307 Ga. App. 126, 704 S.E.2d 235 (2010).

Equal access rule in automobile context. — Equal access rule, as the rule applies in the automobile context, is merely that evidence showing that a person or persons other than the owner or driver of the automobile had equal access to contraband found in the automobile may or will, depending upon the strength of the evidence, overcome the presumption that the contraband was in the exclusive possession of the owner or driver. *Castillo v. State*, 166 Ga. App. 817, 305 S.E.2d 629 (1983).

Evidence was insufficient to support a conviction for possession of cocaine because the sole evidence of possession was the defendant's ownership and driving of the vehicle in which the cocaine was found under the passenger seat, and the passenger had equal access to that cocaine. *Turner v. State*, 276 Ga. App. 381, 623 S.E.2d 216 (2005).

Presumption as to drugs found in automobile. — Absent contrary circumstances, drugs found in an automobile are presumed to belong to the driver and owner. *Moore v. State*, 155 Ga. App. 149, 270 S.E.2d 339 (1980).

Sufficient evidence supported defendant's conviction for possession of cocaine found in the car the defendant was driving despite the fact that others had access to the car the day before and the only evidence linking defendant to the cocaine was the defendant's possession of the car; the trier of fact heard defendant's claim, and apparently decided that defendant did not rebut the inference that the driver of an automobile is presumed to have possession and control of contraband found in the automobile. *Davis v. State*, 272 Ga. App. 33, 611 S.E.2d 710 (2005).

Since the defendant admitted knowing that methamphetamine was in a vehicle

in which the defendant was a passenger, and drug paraphernalia found in the defendant's home showed a sufficient connection to and knowledge of the drugs found in the vehicle, the evidence was sufficient to prove that the defendant was in constructive possession of the drugs in violation of O.C.G.A. § 16-13-30(a). *Clewis v. State*, 293 Ga. App. 412, 667 S.E.2d 158 (2008).

Defendant, as the driver of a vehicle stopped at a roadblock, was presumed to have possession and control of drugs found in the vehicle. Although the defendant presented some evidence of others' access to the vehicle, the question of whether the presumption was rebutted was for the jury, which decided against the defendant. *Blankenship v. State*, 301 Ga. App. 602, 688 S.E.2d 395 (2009).

Evidence was sufficient to support the defendant's convictions for possession of methamphetamine and possession of marijuana because in the absence of any evidence to the contrary, the jury was authorized to consider the rebuttable presumption that the defendant, as the sole driver of a stolen vehicle, had possession of and control over the contraband contained within that vehicle, and the record was devoid of any evidence that someone other than the defendant had access to the interior of the vehicle; while affirmative evidence showing that a person or persons other than the owner or driver of the automobile had equal access to contraband found in the automobile may or will, depending upon the strength of the evidence, overcome the presumption that the contraband was in the exclusive possession of the owner or driver, this legal principle does not mean that the state must establish a negative fact, but rather, the burden on the state remains the same: to prove every element of the crimes charged beyond a reasonable doubt. *Mangum v. State*, 308 Ga. App. 84, 706 S.E.2d 612 (2011).

Presumption of ownership may be overcome by evidence of equal access. — Evidence of equal access to drugs is sufficient to overcome presumption that contraband belongs to defendant driver and owner of automobile and was in defendant's possession; whether or not this

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evidence was sufficient to rebut inference arising from finding of drugs in automobile is a question for jury to decide. *Moore v. State*, 155 Ga. App. 149, 270 S.E.2d 339 (1980).

Evidence was sufficient to convict defendant of possession of marijuana and cocaine based upon the drugs that were found on the floorboard of the truck that defendant used, which defendant's father owned, as defendant did not claim that the drugs belonged to defendant's passenger in the truck and no one else had equal access on that day to the truck. *Marion v. State*, 268 Ga. App. 699, 603 S.E.2d 321 (2004).

Presence of cocaine metabolites in body fluid is direct evidence only of the fact that cocaine was introduced into the body producing the fluid, and is not direct evidence that the person possessed the cocaine. Rather, the presence of cocaine metabolites in body fluid is only circumstantial or indirect evidence of possession. *Green v. State*, 260 Ga. 625, 398 S.E.2d 360 (1990), cert. denied, 500 U.S. 935, 111 S. Ct. 2059, 114 L. Ed. 2d 464 (1991).

Quantification of substance in urine sample not required. — Amounts of controlled substances in urine sample did not have to be quantified to prove charges of driving under the combined influence of marijuana and cocaine and drug possession. *Kerr v. State*, 205 Ga. App. 624, 423 S.E.2d 276, cert. denied, 205 Ga. App. 900, 423 S.E.2d 276 (1992).

Proven through stillborn fetus. — When the indictment charged defendant with possession of cocaine in violation of O.C.G.A. § 16-13-30, it was proper to admit evidence supporting the state's case that a blood specimen of her stillborn fetus tested positive for metabolite of cocaine. *Jackson v. State*, 208 Ga. App. 391, 430 S.E.2d 781 (1993).

Circumstantial evidence charge not necessary when direct evidence is sufficient. — A charge to the jury that a conviction based on circumstantial evidence alone is not warranted unless the proven facts exclude every hypothesis other than the guilt of the accused is not required, even if requested, unless the

state's evidence is entirely circumstantial; when a police officer testified that the officer saw the defendant in actual possession of cocaine, and there was other direct evidence of the defendant's possession of marijuana, including the defendant's admission that the defendant owned the garment in which some marijuana was found, there was no error in the trial court's refusal to give the charge. *Wells v. State*, 180 Ga. App. 133, 348 S.E.2d 681 (1986).

Charge on circumstantial evidence not required. — When, in a trial for possessing heroin with intent to distribute, there was direct evidence that defendant was in possession of heroin, it is not error to refuse to charge on circumstantial evidence. *Houston v. State*, 180 Ga. App. 267, 349 S.E.2d 228 (1986).

Requested charge on mere presence properly denied. — In a trial for possession of cocaine with intent to distribute, the court did not erroneously deny the defendant's request to charge on mere presence, where a police officer testified that the officer watched the defendant receive money from a third party in exchange for a packet of what appeared to be cocaine, and when the officer arrested the defendant moments later, the officer observed a number of packages of what proved to be cocaine in the front seat of the car in which the defendant was seated. *Garner v. State*, 199 Ga. App. 468, 405 S.E.2d 299 (1991).

Instruction proper. — Charge regarding constructive possession which closely tracked the language of the Suggested Pattern Jury Instructions for Criminal Cases and which gave a rebuttable inference of possession was not erroneous. *Pittman v. State*, 208 Ga. App. 211, 430 S.E.2d 141 (1993).

In a prosecution for possession of cocaine with the intent to distribute, the court did not err in giving an instruction on the lesser-included charge of possession of cocaine; no injury resulted because the jury found defendant guilty of possession of cocaine with intent to distribute under O.C.G.A. § 16-13-30(b) and that verdict was supported by sufficient competent evidence. *Brown v. State*, 243 Ga. App. 632, 534 S.E.2d 98 (2000).

Lesser included offense. — When the indictment charged the defendant with trafficking in cocaine by possessing more than 28 ounces, the trial court erred in refusing to give the defendant's requested charge on the lesser included offense of simple possession of cocaine. *Howard v. State*, 220 Ga. App. 579, 469 S.E.2d 746 (1996); *Lumpkin v. State*, 245 Ga. App. 627, 538 S.E.2d 514 (2000).

Because the defendant was indicted for possession of more than 28 grams of methamphetamine, a violation of O.C.G.A. § 16-13-31, the defendant had sufficient notice that the lesser-included offense of possession with intent to distribute, a violation of O.C.G.A. § 16-13-30(b), might be submitted to the jury if the evidence warranted it; consequently, by charging the lesser offense in accordance with O.C.G.A. § 16-1-6, the trial court did not permit the jury to convict the defendant in a manner not alleged in the indictment in violation of the defendant's due process rights. *Rupnik v. State*, 273 Ga. App. 34, 614 S.E.2d 153 (2005).

State proved possession of marijuana. — See *Millwood v. State*, 166 Ga. App. 292, 304 S.E.2d 103 (1983).

Trial court properly denied defendant's motion for a directed verdict of acquittal, and properly entered a judgment of conviction against defendant for misdemeanor possession of marijuana, as the evidence sufficiently showed that defendant possessed marijuana which police found in a search of the home. *Heller v. State*, 275 Ga. App. 637, 621 S.E.2d 591 (2005).

In a drug possession case, the defendant was not convicted based on circumstantial evidence that, in violation of O.C.G.A. § 24-4-6, failed to exclude every other hypothesis save that of the defendant's guilt; the passenger's testimony that the defendant handed the passenger drugs and told the passenger to discard them provided direct evidence that the defendant possessed more than an ounce of marijuana in violation of O.C.G.A. § 16-13-30. *Curtis v. State*, 282 Ga. App. 322, 638 S.E.2d 773 (2006), cert. denied, 2007 Ga. LEXIS 203 (Ga. 2007).

Passenger's testimony, stating that the

defendant passed marijuana to the passenger and told the passenger to discard the marijuana, was sufficiently corroborated under O.C.G.A. § 24-4-8 to support a finding of guilt of possession of more than an ounce of marijuana under O.C.G.A. § 16-13-30; the marijuana found near the defendant was packaged the same way as the marijuana found outside the car, and it could, therefore, be inferred that the marijuana found outside the car had previously been in the back seat beside the defendant. *Curtis v. State*, 282 Ga. App. 322, 638 S.E.2d 773 (2006), cert. denied, 2007 Ga. LEXIS 203 (Ga. 2007).

Possession of methamphetamine proven. — Evidence was sufficient for a jury to find defendant guilty of possession of methamphetamine, as defendant leased a house in which a widespread methamphetamine manufacturing operation took place, which created a strong chemical smell immediately apparent upon entering the house, and defendant tested positive for methamphetamine in the defendant's system, circumstantially linking defendant to the manufacturing process and undermining the claim that defendant was unaware of the activity. *Kirby v. State*, 275 Ga. App. 216, 620 S.E.2d 459 (2005).

Because the defendant, who was a passenger in a vehicle stopped by police, and the vehicle's driver had different responses when the arresting officers asked them where they were going, and a bag containing about three pounds of methamphetamine was found between the passenger's and driver's seats, and the defendant fled the scene, and the packaging of the methamphetamine was very similar to the packaging of the cocaine, marijuana, and cash found at the defendant's residence two months earlier, the evidence was sufficient for a rational trier of fact to find the defendant guilty beyond a reasonable doubt of trafficking in methamphetamine and of possession of methamphetamine with intent to distribute. *Salinas-Valdez v. State*, 276 Ga. App. 732, 624 S.E.2d 278 (2005).

Because a jury could find that the defendant was aware of the methamphetamine that fell from the defendant's pants and that the defendant had actual

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or constructive possession of the methamphetamine, the evidence was sufficient to find the defendant guilty of possession of methamphetamine under O.C.G.A. § 16-13-30(b). *Hayes v. State*, 276 Ga. App. 268, 623 S.E.2d 144 (2005).

There was sufficient evidence to convict the defendant of possession of methamphetamine in violation of O.C.G.A. § 16-13-30(a), as methamphetamine was found in pants from which the defendant retrieved a key and in which the defendant's wallet was found, and methamphetamine was found in the defendant's wallet. *Johnson v. State*, 281 Ga. App. 7, 635 S.E.2d 278 (2006).

Because the trial court properly found that testimony tending to show that the defendant's daughter possessed the methamphetamine the defendant was charged with possessing was hearsay, and testimony from the defendant's grandson was irrelevant, the defendant's conviction for possession was affirmed on appeal. *Corbin v. State*, 287 Ga. App. 194, 651 S.E.2d 101 (2007).

Sufficient evidence was established to support a defendant's conviction for possession of methamphetamine with intent to distribute since the evidence seized from the defendant's vehicle included the division of the drugs in small plastic baggies, which was evidence of intent to distribute, as well as possessing methamphetamine weighing 24.75 grams, which was inconsistent with personal use. *Davis v. State*, 287 Ga. App. 478, 651 S.E.2d 750 (2007), cert. denied, 2008 Ga. LEXIS 179 (Ga. 2008).

There was evidence that the defendant affirmatively stated to police officers that the methamphetamine was defendant's and not another individual's drug. The defendant testified at trial that the defendant had previously been convicted of possession of methamphetamine and that the defendant had used methamphetamine in the house; thus, there was sufficient evidence for the jury to conclude the defendant was in possession of the methamphetamine. *Shoemaker v. State*, 292 Ga. App. 97, 663 S.E.2d 423 (2008).

An officer found methamphetamine in a

portion of a truck where the defendant kept personal belongings and the defendant was the sole occupant of the vehicle. The defendant's testimony denying possession of the drugs and stating that others had equal access to the truck did not establish under O.C.G.A. § 24-4-6 that the circumstantial evidence was insufficient to convict the defendant of possession of methamphetamine. *Bryson v. State*, 293 Ga. App. 392, 667 S.E.2d 170 (2008).

There was sufficient evidence to support a defendant's conviction for possession of methamphetamine based on the contraband being found under the passenger seat in which the defendant was sitting and an officer observing the defendant reach under the seat. Further, a syringe was found in the defendant's pocket; thus, there was more evidence than just spatial proximity to support the conviction. *McBee v. State*, 296 Ga. App. 42, 673 S.E.2d 569 (2009).

Evidence was sufficient to support a conviction of possession of methamphetamine, O.C.G.A. § 16-13-30(a), because the state presented sufficient evidence that the defendant lived at the property, and the jury could, therefore, presume that the defendant had greater access and control to the closet in the house where methamphetamine was found than that of a mere occupant; when the defendant was arrested, the defendant admitted to police that the defendant previously sold methamphetamine, and the officers discovered a large amount of currency on the defendant's person. Scales and syringes were also found at the property, and the individuals who the defendant claimed lived in the home and possessed the methamphetamine were not discovered at the property. *Turner v. State*, 298 Ga. App. 107, 679 S.E.2d 127 (2009).

Evidence supported a conviction of possession of methamphetamine when an officer testified that the officer twice observed the defendant smoke methamphetamine, identified the pipe the defendant used, and explained, from the officer's narcotics training, how the pipe was used to smoke the methamphetamine; there was also methamphetamine recovered from the desk where the defendant was

sitting. While the defendant complained that the pipe was not tested for the presence of methamphetamine, in drug possession cases the state was not required to present expert testimony scientifically identifying the substance or to introduce the drugs into evidence; moreover, the officer's testimony as to a conclusion of fact that could be within the officer's knowledge had been admitted without objection and thus could not be attacked as incompetent. *Burg v. State*, 298 Ga. App. 214, 679 S.E.2d 780 (2009).

Evidence was sufficient to sustain the defendant's conviction for possession of methamphetamine in violation of O.C.G.A. § 16-13-30(a) because the jury was justified in concluding that a wallet containing methamphetamine belonged to the defendant based on a deputy's testimony that the wallet was found on the defendant's person during a pat-down search incident to the defendant's arrest for driving with a suspended license. *McGhee v. State*, 303 Ga. App. 297, 692 S.E.2d 864 (2010).

Trial court did not err in denying the defendant's motion for a directed verdict of acquittal after a jury found the defendant guilty of possession of methamphetamine because the totality of the evidence, although circumstantial, was sufficient to authorize a rational jury to find the defendant guilty beyond a reasonable doubt and to reject as speculative and unreasonable the hypothesis that someone else discarded the drugs in a patrol car; the defendant possessed a homemade smoking pipe containing methamphetamine residue, there was similar transaction evidence, and the patrol officer testified that the officer had exclusive control of the officer's patrol car, the officer stayed with the officer's car whenever the car was serviced by third parties, the officer searched the backseat immediately after the defendant exited from the car, and the officer discovered the drugs directly up under the seat where the defendant had been sitting. *Taylor v. State*, 305 Ga. App. 748, 700 S.E.2d 841 (2010).

Evidence that defendant was actively attempting to dispose of methaqualone by flushing the methaqualone down the toilet authorized defendant's

conviction. *Anderson v. State*, 166 Ga. App. 459, 304 S.E.2d 550 (1983).

Evidence sufficient for conviction.

— See *Smith v. State*, 168 Ga. App. 92, 308 S.E.2d 226 (1983); *Bryant v. State*, 174 Ga. App. 468, 330 S.E.2d 406 (1985); *Lewis v. State*, 174 Ga. App. 613, 330 S.E.2d 810 (1985); *Clarrington v. State*, 178 Ga. App. 663, 344 S.E.2d 485 (1986); *Boles v. State*, 178 Ga. App. 508, 343 S.E.2d 729 (1986); *Brown v. State*, 178 Ga. App. 691, 344 S.E.2d 509 (1986); *Houston v. State*, 180 Ga. App. 267, 349 S.E.2d 228 (1986); *Bradley v. State*, 180 Ga. App. 386, 349 S.E.2d 263 (1986); *Black v. State*, 181 Ga. App. 540, 353 S.E.2d 4 (1987); *Freeman v. State*, 182 Ga. App. 654, 356 S.E.2d 718 (1987); *Pittman v. State*, 183 Ga. App. 12, 357 S.E.2d 855 (1987); *Bentley v. State*, 183 Ga. App. 112, 358 S.E.2d 274 (1987); *Howard v. State*, 185 Ga. App. 215, 363 S.E.2d 621 (1987); *Lewis v. State*, 186 Ga. App. 349, 367 S.E.2d 123 (1988); *Wright v. State*, 189 Ga. App. 441, 375 S.E.2d 895 (1988); *Doe v. State*, 189 Ga. App. 793, 377 S.E.2d 546 (1989); *Reeves v. State*, 194 Ga. App. 539, 391 S.E.2d 35 (1990); *Smith v. State*, 197 Ga. App. 609, 398 S.E.2d 858 (1990); *Nelson v. State*, 197 Ga. App. 898, 399 S.E.2d 748 (1990); *Shiropshire v. State*, 201 Ga. App. 421, 411 S.E.2d 339 (1991); *Ross v. State*, 206 Ga. App. 1, 424 S.E.2d 308 (1992); *Turner v. State*, 213 Ga. App. 77, 443 S.E.2d 703 (1994); *Moreland v. State*, 213 Ga. App. 638, 445 S.E.2d 388 (1994); *Teasley v. State*, 214 Ga. App. 646, 448 S.E.2d 904 (1994); *Thomas v. State*, 222 Ga. App. 337, 474 S.E.2d 631 (1996); *Lang v. State*, 226 Ga. App. 729, 487 S.E.2d 485 (1997); *Tate v. State*, 230 Ga. App. 186, 495 S.E.2d 658 (1998); *King v. State*, 230 Ga. App. 301, 496 S.E.2d 312 (1998); *Johnson v. State*, 230 Ga. App. 507, 496 S.E.2d 785 (1998); *Grant v. State*, 239 Ga. App. 608, 521 S.E.2d 654 (1999); *Heath v. State*, 240 Ga. App. 492, 522 S.E.2d 761 (1999); *Brackins v. State*, 249 Ga. App. 788, 549 S.E.2d 775 (2001); *Wood v. State*, 264 Ga. App. 787, 592 S.E.2d 455 (2003); *In the Interest of A.A.*, 265 Ga. App. 369, 593 S.E.2d 891 (2004).

Evidence sufficient to sustain conviction for possession of cocaine with intent to distribute. *Kinney v. State*, 199 Ga. App. 354, 405 S.E.2d 98 (1991).

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Evidence showing that cocaine found in the defendant's possession was divided between more than 30 small glassine or clear plastic packages indicated a manner of packaging commonly associated with the sale or distribution of such contraband and would authorize any rational trier of fact to infer that the defendant possessed cocaine with the intent to distribute. *Williams v. State*, 199 Ga. App. 544, 405 S.E.2d 539 (1991).

Defendant's presence in the vicinity of cocaine, defendant's participation in an attempt to elude possession, the finding of cocaine at the defendant's feet and the presence of cocaine in the defendant's bodily system as evinced by drug tests were sufficient to authorize a rational trier of fact to infer that the defendant possessed cocaine with intent to distribute. *Jones v. State*, 207 Ga. App. 46, 427 S.E.2d 40 (1993).

Defendant's conviction of possession of cocaine in violation of the Georgia Controlled Substances Act, O.C.G.A. § 16-13-30, was supported by sufficient evidence; the defendant admitted that a passenger in the defendant's vehicle had purchased crack cocaine, and a pipe found in the vehicle tested positive for cocaine residue. *Bevis v. State*, 259 Ga. App. 269, 576 S.E.2d 652 (2003).

Conviction of a second defendant for possession of marijuana with intent to distribute in violation of O.C.G.A. § 16-13-30 was affirmed after: (1) evidence that the second defendant expected to receive \$1,000 to receive a package for a person authorized the jury to conclude beyond a reasonable doubt that defendant was aware the package contained contraband; (2) a mistrial was not warranted since curative instructions were given by the court regarding the irrelevancy of remands by the first defendant's attorney; and (3) the package was admissible since it was easily identifiable, securely packed, and there was no evidence of tampering. *Sandoval v. State*, 260 Ga. App. 61, 579 S.E.2d 75 (2003).

Evidence of the defendant's possession of cocaine was sufficient when the evidence consisted of a police officer's testi-

mony that the officer saw the defendant discard a glass tube while fleeing the officer and a forensic chemist's testimony that the tube contained trace amounts of cocaine. *Jones v. State*, 260 Ga. App. 487, 580 S.E.2d 278 (2003).

Evidence was sufficient to support defendant's conviction for possession of cocaine with intent to distribute, as a police officer saw defendant commit traffic offenses, pursued defendant's car for those offenses, saw defendant throw a white substance out of the driver's side window, the substance was later identified as an amount of cocaine consistent with the distribution and personal use of cocaine, and defendant had a large amount of cash on defendant at the time defendant's car was finally stopped; the evidence was sufficient under the Jackson standard to support each element of defendant's conviction although a remand was required to make a finding regarding an ineffective assistance of counsel claim. *Talbot v. State*, 261 Ga. App. 12, 581 S.E.2d 669 (2003).

On appeal from the trial court's judgment convicting the defendant of possession of marijuana, the appellate court refused to affirm the defendant's conviction on the basis of seeds, stems, and residue that were found in the defendant's bedroom because those items were not tested scientifically and a forensic toxicologist who testified could not state beyond a reasonable doubt that the items were marijuana, but the appellate court held that the toxicologist's testimony that the toxicologist found marijuana metabolites in a urine sample the defendant gave to police was sufficient to sustain the defendant's conviction. *Cargile v. State*, 261 Ga. App. 319, 582 S.E.2d 473 (2003).

Evidence was sufficient to support the defendant's conviction for possession of cocaine when the state introduced blood test results showing a metabolite of cocaine in the defendant's blood after the defendant refused to spit out the substance the defendant was chewing. *Millsap v. State*, 261 Ga. App. 427, 582 S.E.2d 568 (2003).

Evidence held sufficient for possessing cocaine, possessing cocaine within 1,000 feet of a housing project, and attempted

bribery, where police officers observed the defendant engaging in what appeared to be a drug transaction, the officers thereafter found cocaine on the sidewalk where the defendant had been standing and cocaine in the defendant's pockets, and the defendant told a police officer who was counting the defendant's money to take it and the defendant's watch, and that the defendant would pay the officer more in a week if the officer would let the defendant go. *Hester v. State*, 261 Ga. App. 614, 583 S.E.2d 274 (2003).

Even assuming the lab results regarding methamphetamine were non-probative hearsay, the detailed testimony by the officers provided the requisite evidence to convict defendant of manufacturing and trafficking in methamphetamine. *Bilow v. State*, 262 Ga. App. 850, 586 S.E.2d 675 (2003).

Testimony of the officers alone held sufficient to support convictions of selling cocaine as the credibility and weight to be given to the witnesses was within the province of the jury. *Sutton v. State*, 261 Ga. App. 860, 583 S.E.2d 897 (2003).

Evidence that, *inter alia*, an officer observed the defendant drop a piece of paper which later tested positive for cocaine was sufficient to support a conviction for possession of cocaine. *Griffin v. State*, 266 Ga. App. 50, 596 S.E.2d 405 (2004).

Evidence supported the defendant's conviction for possession of methamphetamine as an accomplice's statement that the defendant was involved in a drug transaction was supported by the defendant's admission that the defendant was at the accomplice's house to buy drugs, the defendant's possession of a digital scale of the type used in drug transactions, and cash in an amount an expert testified was typical of that charged for an eightball of methamphetamine. *Lewis v. State*, 268 Ga. App. 547, 602 S.E.2d 278 (2004).

There was sufficient evidence to show that the defendant possessed cocaine since the defendant resided in the bedroom where the cocaine was discovered, a friend testified that the friend heard the defendant admit the cocaine was found in the defendant's room, the defendant's mother pointed out the room as defendant's, and after the cocaine was discov-

ered, the defendant went into hiding, and the argument of equal access by the defendant's mother and brother to the cocaine was unavailing when other evidence linked the defendant to the cocaine. *Truitt v. State*, 266 Ga. App. 56, 596 S.E.2d 219 (2004).

Defendant's acts, including telephoning a known drug dealer about purchasing cocaine and driving to an agreed location to make the transaction sufficiently constituted a substantial step to convict defendant of attempting to possess cocaine. *Massey v. State*, 267 Ga. App. 482, 600 S.E.2d 437 (2004).

When marijuana allegedly possessed by the defendant was tested by the state crime lab but then was lost and was not presented at trial, the evidence presented, including the defendant's admissions and the arresting officers' identification of the marijuana, was sufficient to sustain the defendant's possession conviction. *Jones v. State*, 268 Ga. App. 246, 601 S.E.2d 763 (2004).

Evidence that an undercover police officer tried to purchase drugs from a third person, that the third person said the person would have to get the drugs from "his source," and that the officer was present when defendant gave a package to a third person shortly before the third person delivered cocaine to the officer was sufficient to sustain defendant's convictions for trafficking in cocaine and possessing cocaine with intent to distribute. *Serrate v. State*, 268 Ga. App. 276, 601 S.E.2d 766 (2004).

Evidence was sufficient to support the defendant's conviction of possession of cocaine in violation of O.C.G.A. § 16-13-30(a) as cocaine was a controlled substance under O.C.G.A. § 16-13-26(1)(D) and the defendant had an additional 2.2 grams of cocaine in the defendant's pocket when the defendant was arrested for trafficking in cocaine found in a cooler. *Salgado v. State*, 268 Ga. App. 18, 601 S.E.2d 417 (2004).

Evidence was sufficient to sustain convictions of possession of controlled substances, O.C.G.A. § 16-13-30(a), and possession of controlled substances with intent to distribute, O.C.G.A. § 16-13-30(b), when two witnesses testified that the substance in a bag carried by the defendant appeared to be

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crack cocaine, and a field test indicated that the substance was crack cocaine. *Riddle v. State*, 267 Ga. App. 630, 600 S.E.2d 709 (2004).

When the defendant's possession of a vehicle was not the sole evidence of defendant's possession of drugs and a confidential informant's testimony was not material to the defense, the defendant was not entitled to know the informant's identity and the trial court properly denied the defendant's motion for a new trial on the charges of possession of cocaine. *Respress v. State*, 267 Ga. App. 654, 600 S.E.2d 727 (2004).

Evidence was sufficient to support the defendant's conviction for possession of cocaine as cocaine was found in the defendant's pocket during a search of the defendant's clothes while being arrested on other charges. *Finney v. State*, 270 Ga. App. 422, 606 S.E.2d 637 (2004).

Defendant's cocaine possession conviction was affirmed as defendant's statement that defendant and two other men went to the victim's house to buy cocaine, that the victim came out of the victim's house with the cocaine and gave it to defendant, and that defendant split the cocaine with defendant's accomplices, was corroborated by proof that cash was found on the victim's bed next to several bags of a substance that later tested positive for crack cocaine. *Williams v. State*, 270 Ga. App. 424, 606 S.E.2d 871 (2004).

Evidence was sufficient to support the defendant's conviction for possession of cocaine as the evidence showed that the defendant kept cocaine in the office and that the defendant alone controlled access to the defendant's office as a sign on the office door made it plain that the office was the defendant's office and that the office was off limits to everyone except the defendant. *Simmons v. State*, 271 Ga. App. 330, 609 S.E.2d 678 (2005).

Evidence was sufficient to support the defendant's conviction for possession of cocaine as police searched a hotel room where the defendant was with a girlfriend and cocaine residue and paraphernalia was found. *Wilson v. State*, 271 Ga. App. 359, 609 S.E.2d 703 (2005).

Evidence supported the defendant's possession of marijuana conviction because: defendant fled from the police, kicked two officers, and had marijuana, BC packets, and a cell phone, and the defendant's DNA matched the DNA on the beer can. *Lewis v. State*, 271 Ga. App. 744, 611 S.E.2d 80 (2005).

Evidence supported the defendant's conviction for possession of methamphetamine because a police officer testified the methamphetamine was taken from the defendant's wallet. *Morrison v. State*, 272 Ga. App. 34, 611 S.E.2d 720, *aff'd*, 280 Ga. 222, 626 S.E.2d 500 (2006).

Conviction for possession by ingestion of methamphetamine was supported by a positive preliminary urine test for amphetamines conducted by the defendant's supervising probation officer and a gas chromatography/mass spectrometry test performed on the sample by the state forensic toxicologist, which confirmed the presence of methamphetamine. *Poston v. State*, 274 Ga. App. 117, 617 S.E.2d 150 (2005).

Sufficient evidence supported the defendant's conviction of possession of cocaine under O.C.G.A. § 16-13-30(a) as: (1) the informant testified that the defendant procured crack cocaine for the informant for \$300.00; (2) detectives witnessed the defendant enter and exit the bar where, according to the informant, defendant obtained the cocaine; and (3) the substance tested positive for cocaine, a controlled substance under O.C.G.A. § 16-13-26(1)(D); the credibility of the informant, which, according to the defendant, was allegedly impaired by the informant's prior criminal conduct, was an issue for the jury. *Ross v. State*, 275 Ga. App. 137, 619 S.E.2d 809 (2005).

Circumstantial evidence under O.C.G.A. § 24-4-6 was sufficient to support defendant's conviction for possession of cocaine, in violation of O.C.G.A. § 16-13-30, as defendant was approached by two undercover officers and upon seeing that one of them had a badge, defendant turned around and made a throwing motion with a clenched fist in the direction of a trash barrel; defendant was in an area known for drug sales, and three pieces of crack cocaine were found in the vicinity of the trash barrel. *Woods v. State*, 275 Ga. App. 471, 620 S.E.2d 660 (2005).

Conviction for possessing cocaine with intent to distribute was sufficiently supported by evidence showing that 1.5 grams of cocaine were found in the defendant's pocket and that an electronic scale, small plastic baggies, and over \$2,600.00 in cash were found in the defendant's residence. *Copeland v. State*, 273 Ga. App. 850, 616 S.E.2d 189 (2005).

Although a videotape of the transaction provided helpful confirmation of an undercover officer's identification of the defendant as the seller of cocaine, the testimony of the officer, by itself, was sufficient to support the jury's determination of guilt. *Williams v. State*, 277 Ga. App. 633, 627 S.E.2d 196 (2006).

Evidence was sufficient to support conviction of simple possession of cocaine where, during the defendant's flight on foot from an officer, the officer saw defendant take an object from a pocket and flick it away and where the police found a small box containing drugs in the area of the chase, which the officer identified as the object the defendant discarded. *Wilburn v. State*, 278 Ga. App. 76, 628 S.E.2d 174 (2006).

Sufficient evidence, including a tape recording of the drug transaction, testimony from three government agents, and the jury's rejection of the defendant's defenses of misidentification and mere presence at the scene of a crime supported the defendant's sale of cocaine conviction; the defendant failed to preserve an alleged error in the jury charge regarding the factors the jury may consider in assessing reliability of identification testimony. *Bonner v. State*, 278 Ga. App. 855, 630 S.E.2d 127 (2006).

Defendant's convictions of possession of cocaine, O.C.G.A. § 16-13-30(a), and giving a false name and date of birth, O.C.G.A. § 16-10-25, were supported by sufficient evidence that, during a level-one encounter with an officer, the defendant gave the officer a false name and birth date, that, during a subsequent search of the defendant's person validly consented to by the defendant, the officer found documents that revealed the defendant's true identity and five pieces of a substance that the officer suspected was crack cocaine, that the officer's field test of the substance

indicated positive for cocaine, that the substance was later tested at a state crime lab which confirmed that it was cocaine, and that there was a sufficient chain of custody for that substance. *Postell v. State*, 279 Ga. App. 275, 630 S.E.2d 867 (2006).

There was sufficient evidence to sustain the jury's verdict finding the defendant guilty beyond a reasonable doubt of possession of cocaine in violation of O.C.G.A. § 16-13-30(a), as the arresting officer testified that the defendant was in possession of a substance that tested positive for cocaine. *Copeland v. State*, 281 Ga. App. 11, 635 S.E.2d 283 (2006).

Appellate court upheld the defendant's convictions for possession of cocaine, sale of cocaine, and possession of cocaine with intent to distribute, based on sufficient evidence consisting of testimony from two special agents identifying the defendant, a videotape of a cocaine sale, and positive test results confirming the substance the defendant sold and possessed was cocaine. *Henley v. State*, 281 Ga. App. 242, 635 S.E.2d 856 (2006).

Upon the defendant's challenge to the evidence supporting a cocaine possession charge and portions of the State's closing argument, because sufficient evidence corroborated the accomplice testimony supporting said charge, including that cocaine was found in the vicinity of the vehicle the defendant drove, and the defendant's flight from police showed a consciousness of guilt, conviction on said charge was upheld; moreover, the defendant waived objection to any argument of future dangerousness, and even if an objection had been made, the prosecutor's argument was proper, as such urged conviction based on current evidence that the defendant was a drug dealer and could not be seen as urging conviction based on future dangerousness. *Carr v. State*, 282 Ga. App. 199, 638 S.E.2d 348 (2006).

Sufficient evidence supported the defendant's conviction of possession of cocaine with intent to distribute under O.C.G.A. § 16-13-30 despite the passenger's claim at trial that the passenger, not the defendant, threw the cocaine out the car window; the jury was permitted to reject the passenger's trial testimony as it conflicted

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with the passenger's earlier statement that the defendant had thrown the cocaine, and other evidence included the officer's statement that the cocaine was thrown from the driver's side where the defendant had been seated, and a substantial amount of cash was recovered from the defendant. *Smith v. State*, 282 Ga. App. 255, 638 S.E.2d 388 (2006).

Defendant's convictions for possession of cocaine with intent to distribute and possession of a controlled substance within 1,000 feet of a housing project, in violation of O.C.G.A. § 16-13-30(b) and O.C.G.A. § 16-13-32.5(b), were based on sufficient evidence since the state proved by circumstantial evidence pursuant to O.C.G.A. § 24-4-6 that the defendant had been walking back and forth to an overturned bucket when people approached from the street in what appeared to be drug transactions, and the drugs were found under the bucket; there was evidence that the amount of drugs recovered were more than one would use for personal use, such that it indicated an intent to distribute, and there was also evidence indicating the proximity of the bucket to a nearby public housing complex. *Reason v. State*, 283 Ga. App. 608, 642 S.E.2d 236 (2007).

Defendant's convictions for malice murder, aggravated battery, burglary, and violation of the Georgia Controlled Substances Act, O.C.G.A. § 16-13-30 et seq., by unlawfully possessing cocaine and marijuana were supported by sufficient evidence; the defendant walked into a neighbor's house with a butcher knife in each hand and stabbed two people, knives found in the woods behind the defendant's apartment matched the descriptions of those used in the stabbings and had deoxyribonucleic acid matching the defendant's, two knives were missing from a knife block in the defendant's apartment, marijuana and cocaine were found in the apartment, the defendant told a friend that the defendant had "hurt some people really bad," and three eyewitnesses identified the defendant as the assailant. *Swanson v. State*, 282 Ga. 39, 644 S.E.2d 845 (2007).

There was sufficient evidence of possession to support a defendant's convictions of trafficking in cocaine, possession of cocaine with the intent to distribute, possession of marijuana, and possession of a firearm during the commission of a crime since: the defendant sped off when police tried to stop the defendant for running a stop sign; narcotics and a gun were found in the passenger side of the car; the passenger's story that the passenger had flagged down the defendant for a ride and that the passenger was unaware of the drugs and the gun was corroborated by the passenger's girlfriend; the defendant's sister, who owned the car, testified that there was no contraband in the car before the defendant took the car; the defendant had \$1,755 in cash on the defendant's person; and the defendant had prior drug offenses. *Jackson v. State*, 284 Ga. App. 619, 644 S.E.2d 491 (2007), cert. denied, No. S07C1169, 2007 Ga. LEXIS 521 (Ga. 2007).

Given that the evidence presented against the defendant showed that, as the only passenger in a moving vehicle, the defendant, as that passenger, and not the driver, could have tossed bags of cocaine out of a window, the evidence supported the defendant's possession conviction. *Johnson v. State*, 283 Ga. App. 425, 641 S.E.2d 655 (2007).

Defendant's conviction for cocaine possession did not rest on "mere presence" evidence; an officer's unobstructed observation of the defendant in the act of throwing a crack pipe onto the ground, combined with the lab testing of the substance removed from the pipe, provided ample direct evidence from which the jury could have found that the defendant possessed cocaine. *Smith v. State*, 285 Ga. App. 399, 646 S.E.2d 499 (2007); *Marshall v. State*, 286 Ga. App. 86, 648 S.E.2d 674 (2007).

Evidence supported the defendant's convictions of two counts of malice murder, armed robbery, and possession of cocaine since: a driver carrying a gun and a bag ran out of a car that had been dragging the body of the car's owner and that had another dead victim in the passenger seat; bags of cocaine were on the lap of the victim in the passenger seat; one victim

had been shot with a .44 caliber weapon; a canine unit located a .44 caliber revolver, cash, a man's clothes with cocaine in them, and a shoulder bag in the woods into which the driver had fled; the defendant came out of the woods wearing only underwear; and the defendant admitted to shooting the victims. *Preston v. State*, 282 Ga. 210, 647 S.E.2d 260 (2007).

In a prosecution for possession of marijuana with intent to distribute, there was sufficient evidence that the defendant possessed the marijuana found in a car in which the defendant was riding; the defendant admitted to owning the car, marijuana was found where the defendant had been sitting and under the driver's seat, and a passenger testified that the defendant had been driving earlier that evening and that the defendant admitted to the passenger that the marijuana was the defendant's. *King v. State*, 287 Ga. App. 375, 651 S.E.2d 496 (2007).

There was sufficient evidence to support a conviction for possession of methamphetamine and possession of drug related objects when the defendant admitted telling officers that the defendant owned a pipe that had methamphetamine residue on the pipe, but said that the admission had been made under pressure and that a purse in which drug-related items were found was a "community purse" used by employees of the convenience store where the defendant worked; it was for the jury to resolve conflicts in the testimony and to weigh the evidence. *Doyal v. State*, 287 Ga. App. 667, 653 S.E.2d 52 (2007).

Given that two officers testified that the officers saw the defendant, in plain view, packaging 35 grams of cocaine and 94 grams of marijuana into smaller packages, and the testimony of a single witness was generally sufficient to establish a fact, the defendant's convictions for trafficking in cocaine and possession of marijuana with the intent to distribute were upheld on appeal. *King v. State*, 289 Ga. App. 461, 657 S.E.2d 570 (2008).

There was sufficient evidence to uphold defendant's conviction for drug possession as the evidence established that the defendant attempted to sell drugs during a controlled buy situation set up by the

police and a gray pouch containing numerous small red bags of marijuana as well as one medium-sized bag of cocaine were found on the defendant's person. Further, at trial, the defendant admitted to possessing the marijuana and, although defendant insisted that the officers put the cocaine in the gray pouch, three officers participating in the arrest denied that the cocaine and the pouch had been planted. *Habersham v. State*, 289 Ga. App. 718, 658 S.E.2d 253 (2008).

Trial court properly denied a defendant's motion for a new trial, and there was sufficient evidence to support defendant's conviction for possession of cocaine with the intent to distribute and that defendant's drug possession was not for personal use, based on the finding of 25 pieces of crack cocaine, totaling 1.68 grams being found on defendant's person, and an officer testifying that the officer investigated crack cocaine sales in the area for over a year and was familiar with the price of crack cocaine, how the cocaine was packaged, how buyers and sellers interact, and how sellers often use a two-way radio, such as was found on the defendant, to conduct the transactions. Defendant's contention that the defendant was addicted to crack cocaine was further contradicted by no crack pipe being found on the defendant's person, nor was there any evidence that the defendant was under the influence of any drug at the time of the search. *Griffin v. State*, 291 Ga. App. 618, 662 S.E.2d 171 (2008).

There was sufficient evidence to support defendant's conviction for possession of cocaine and marijuana, both with intent to distribute, and defendant's conviction was not based only on circumstantial evidence as there was direct evidence that the defendant sold cocaine based on the defendant being observed in the bathroom of the residence doing something at the toilet in response to the police entry; a large quantity of cocaine and marijuana were found in the toilet tank; a witness linked defendant to those drugs; several digital scales were found around the house; and two witnesses testified that no one else in the house sold drugs but defendant. *Howard v. State*, 291 Ga. App. 386, 662 S.E.2d 203 (2008).

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As the defendant admitted at trial that the defendant was in possession of a gun and cocaine when the defendant was stopped by the police and that the defendant was 16 years old at the time, there was sufficient evidence for the jury to find the defendant guilty of possession of cocaine, possession of a firearm while in the commission of a felony, and possession of a pistol by a person under the age of 18. *Olive v. State*, 291 Ga. App. 538, 662 S.E.2d 308 (2008).

Convictions of manufacture, distribution, and possession of methamphetamine with the intent to distribute under O.C.G.A. § 16-13-30(b), possession of ephedrine/pseudoephedrine under O.C.G.A. § 16-13-30.3(b)(1), and possession of a firearm during the commission of a felony under O.C.G.A. § 16-11-106(b)(4) were supported by the evidence. A panel van belonging to the defendant had been modified as a methamphetamine lab, was located on the defendant's property, and was powered by an electrical cord running from the defendant's trailer; everything necessary to support the production of methamphetamine was present in the vicinity of the vehicle; the defendant's name and that of the defendant's spouse had been scrawled on an interior panel of the vehicle; the defendant offered to provide any methamphetamine that a house guest wanted; uncured methamphetamine and enough ephedrine was present at the scene to make 30 to 33 grams of methamphetamine; and the defendant admitted to giving methamphetamine to others and to owning the sawed-off shotgun recovered from the panel van. *Boone v. State*, 293 Ga. App. 654, 667 S.E.2d 880 (2008).

Additional evidence other than a defendant's ownership of the premises demonstrated the defendant's possession of cocaine with intent to distribute. The cocaine was found in an office containing the defendant's personal items; entry into the office had been made more difficult by installation of a steel padlocked door, which was locked when officers arrived to conduct the search; the defendant admitted to installing surveillance equipment;

numerous items used to measure, prepare, and ingest cocaine were found in the office; and the defendant admitted to an officer that pill bottles of cocaine belonged to the defendant. *Bailey v. State*, 294 Ga. App. 437, 669 S.E.2d 453 (2008).

Evidence was sufficient to support convictions of felony murder and possession of cocaine. A person fitting the defendant's description, wearing black clothing and carrying a black garbage bag, ran from the store where the victim worked; within an hour of the shooting, the defendant, who lived three blocks away, gave a neighbor's child "cigars without tobacco" and lottery tickets from a black garbage bag, and said that the defendant had "hit a lick"; packages of tobacco tubes were found on the ground between the store and the defendant's apartment complex; the victim's wallet was found in a trash receptacle at the complex, and a police dog followed the scent on the wallet to the defendant's apartment; officers searching the defendant's apartment found cocaine, a handgun, black clothing, a black stocking, and a novelty dollar bill of the sort that had been given to the victim the night before the shooting; and the bullet that killed the victim was fired from the handgun in the defendant's room. *Jones v. State*, 284 Ga. 672, 670 S.E.2d 790 (2008).

There was sufficient evidence to support a defendant's conviction for possession of cocaine based on the police observing the defendant making a throwing motion with the defendant's hands after the police commanded the defendant to come and thereafter finding in the area where the defendant was standing three rocks of dry crack cocaine even though it had been raining, and no one else was in the area. *Ware v. State*, 297 Ga. App. 400, 677 S.E.2d 423 (2009).

Evidence was sufficient to support a conviction of cocaine and marijuana possession. An officer testified that the officer found a plastic bag containing the drugs in the location where the officer saw a person identified as the defendant pull out an object and then replace the object; the defendant's arguments regarding the identification testimony, which was contradicted by defense witnesses, went to the weight and credit to be given the

evidence and not to the evidence's sufficiency. *Smith v. State*, 297 Ga. App. 658, 678 S.E.2d 496 (2009).

Convictions of drug possession pursuant to O.C.G.A. §§ 16-13-2, 16-13-28, and 16-13-30 were supported by sufficient evidence under circumstances in which, following a stop, an officer found a bag of marijuana in the defendant's pocket, and, after arresting the defendant, the officer also found \$858 in the defendant's pockets and a bottle containing 16 pills of Alprazolam under the dashboard of the car the defendant had been driving; the pills were what remained of a 90-pill prescription issued five days before to a different person. Further, a bag of cocaine was later found in the patrol car where the defendant was held before backup officers arrived. *Noellien v. State*, 298 Ga. App. 47, 679 S.E.2d 75 (2009).

There was sufficient evidence to support a defendant's conviction for possession of methamphetamine with the intent to distribute with regard to the police finding the contraband in the defendant's vehicle, despite the defendant's contention that the state failed to show that the defendant was in possession of the drug and failed to show an intention to distribute, based on the defendant's intentional use of the vehicle. Further, there was testimony from a witness that the witness had recently ingested methamphetamine that was procured from the defendant and the codefendants and that the defendant provided the transportation that facilitated the procurement of the methamphetamine that was ingested. *Armstrong v. State*, 298 Ga. App. 855, 681 S.E.2d 662 (2009).

Evidence was sufficient to convict the defendant of possession of methamphetamine in violation of O.C.G.A. § 16-13-30(a) because the defendant occupied and controlled a trailer where the drugs were found. *Peacock v. State*, 301 Ga. App. 873, 689 S.E.2d 853 (2010).

Evidence was sufficient to convict a defendant of constructive possession of cocaine in violation of O.C.G.A. § 16-13-30(a) given that an extended stay motel room where an undercover officer purchased cocaine was rented to the defendant, the defendant was in the room, and drugs and paraphernalia were in plain view on the

table. A jury could infer that the defendant was aware of the cocaine, was in control of the cocaine, and was in sole or joint constructive possession of the cocaine. *Conyers v. State*, 302 Ga. App. 95, 690 S.E.2d 233 (2010), cert. denied, No. S10C0909, 2010 Ga. LEXIS 439 (Ga. 2010).

Evidence was sufficient to permit a rational jury to find the defendant guilty beyond a reasonable doubt of possession of cocaine in violation of O.C.G.A. § 16-13-30 because a sheriff's deputy and the arresting officer testified that cocaine was found on the defendant's person and the expert testimony of the state crime lab technician confirmed that the seized substance was cocaine. *Davis v. State*, 304 Ga. App. 355, 696 S.E.2d 381 (2010).

Any rational trier of fact could have found the defendant guilty of trafficking in cocaine, possession of methylenedioxyamphetamine, and possession of less than one ounce of marijuana beyond a reasonable doubt because based on the evidence, the jury was authorized to conclude that the defendant threw a plastic bag containing drugs out the passenger side window of the defendant's car; the state presented evidence that a deputy saw the defendant actually possessing the bag of illegal narcotics as the defendant held the bag in the car before the defendant threw the bag out the passenger's window, and another deputy assigned to the drug suppression task force testified, without objection, that the amount of cocaine in the bag was more than a user would have in a user's possession and that would be the amount that a mid-level dealer would have in a dealer's possession. *McCombs v. State*, 306 Ga. App. 64, 701 S.E.2d 496 (2010).

Trial court determines credibility and resolves conflicts. — In a bench trial, because conflicts in the evidence were for the trial court as the trier of fact, and not the court of appeals to resolve, the defendant's convictions for theft by taking a motor vehicle and possessing cocaine were not subject to reversal on appeal based on the conflicts. *Marshall v. State*, 286 Ga. App. 86, 648 S.E.2d 674 (2007).

Defendant failed to demonstrate search warrant inadequately described car where cocaine found. — Trial court properly denied defendant's

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motion to suppress evidence and motion for a directed verdict of acquittal, and properly entered a judgment of conviction against defendant for possession of cocaine, as the evidence sufficiently showed that defendant possessed cocaine which police found in a search of defendant's home and vehicle parked on a street just outside a fence that defendant and the wife owned; the motion to suppress was properly denied since defendant did not show that the search warrant inadequately described the car in which the cocaine would be found. *Heller v. State*, 275 Ga. App. 637, 621 S.E.2d 591 (2005).

Drugs within vehicles. — Evidence was sufficient to authorize the jury's finding that defendant was in joint constructive possession of the cocaine, marijuana, and a pistol found inside the driver's car because the drugs were in plain view inside a car that smelled of raw marijuana, defendant was nervous about the impending search and gave evasive answers to the officers, defendant was in possession of an unusually large amount of cash and was in a position to see the pistol when the driver took the driver's proof of insurance from the glove box and, given the trafficking amount of cocaine found, the jury was authorized to infer that the driver and defendant possessed a loaded handgun to protect their illegal drug trade; thus, the evidence was sufficient to support the jury's finding that defendant was guilty of trafficking in cocaine, possession of marijuana, and possession of a firearm during the commission of a crime. *Lopez v. State*, 259 Ga. App. 720, 578 S.E.2d 304 (2003).

When narcotics officers observed the defendant attempt to destroy a white substance against the side of the defendant's vehicle, and by rubbing the defendant's hand against a beer can, when coupled with a positive field test of both areas for cocaine, provided sufficient direct evidence to sustain a possession of cocaine conviction. *Davis v. State*, 260 Ga. App. 853, 581 S.E.2d 380 (2003).

When the evidence was sufficient to conclude that the defendant saw, had access to, and control over a plastic bag of

cocaine sitting on a vehicle's front passenger seat, the trial court did not err in denying the defendant's acquittal motion. *Felder v. State*, 264 Ga. App. 583, 591 S.E.2d 471 (2003).

Rational trier of fact was authorized to find that both defendants burglarized the victims' residence; that, once inside, they took money, clothing, and other personal property by use of a gun; that the first defendant also committed an aggravated assault on the female victim by striking her in the head with a handgun and was, therefore, in possession of a firearm during the commission of a crime; and that both defendants, along with their cohorts, had been in possession of the cocaine which was tossed out the vehicle they were riding in and found along the roadway. *Davis v. State*, 264 Ga. App. 221, 590 S.E.2d 192 (2003).

Defendant was properly convicted of possession of cocaine after a crack pipe with cocaine residue was found in defendant's car because although defendant claimed that the pipe belonged to a friend, defendant admitted knowing of the pipe's presence in defendant's car. *Walker v. State*, 265 Ga. App. 449, 594 S.E.2d 678 (2004).

There was sufficient evidence to support defendant's conviction for possession of cocaine with intent to distribute because defendant was lawfully stopped for a traffic violation due to having only one operational headlight, a canine alerted to the passenger side of the vehicle, and a search of defendant's person and of the truck revealed cocaine and cash in such amounts as to lead a reasonable person to conclude that defendant had been selling the drugs. *Barnett v. State*, 275 Ga. App. 464, 620 S.E.2d 663 (2005).

Evidence was sufficient to support the defendant's conviction for violation of O.C.G.A. § 16-13-30 of the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., because a passenger in the defendant's truck testified that the defendant purchased crack cocaine from an individual in a high drug area, a rock of crack cocaine was found in the defendant's truck, and a police officer corroborated that testimony pursuant to O.C.G.A. § 24-4-8 with the officer's own observa-

tions that the individual that the defendant was talking to had money in the individual's hand as it was lowered from the defendant's truck window. *Millsap v. State*, 275 Ga. App. 732, 621 S.E.2d 837 (2005).

Since there was direct testimony that the defendant possessed the cocaine found in a car, corroborated by circumstantial evidence that a police officer saw the defendant take something from the defendant's pants and place it on the floor of the car, the defendant was properly found guilty of possession of cocaine. *Depree v. State*, 276 Ga. App. 499, 623 S.E.2d 701 (2005).

Evidence that there were plastic bags of drugs in the driver's side door of a vehicle in which the defendant was sitting in the driver's seat, along with plastic bags recovered from the defendant's pocket that matched the bags containing the drugs, was sufficient to convict the defendant of possession of marijuana and cocaine with intent to distribute. *Mackey v. State*, 299 Ga. App. 851, 683 S.E.2d 899 (2009).

Evidence that a cigarette pack containing methamphetamine and cocaine was found at the defendant's feet on the floor of a car after a traffic stop, along with evidence that the others in the car had just picked up the defendant to buy drugs from the defendant, was sufficient to allow a jury to find constructive possession in violation of O.C.G.A. § 16-13-30(a). *Howard v. State*, 300 Ga. App. 124, 684 S.E.2d 297 (2009).

Trial court did not err in convicting the defendant of possession of cocaine with the intent to distribute, O.C.G.A. § 16-13-30(b), and possession of marijuana, O.C.G.A. § 16-13-2(b), because the circumstantial evidence established a meaningful connection between the defendant and the contraband, evidence which showed the defendant exercising power and dominion over the drugs found inside the wheel well on the front passenger's side of a car; the jury could infer that the drugs had been recently placed in the wheel well, and because the defendant had fled from the police, had been caught within arm's reach of the drugs, and had a large amount of cash in the defendant's pockets, the jury could infer that the de-

fendant was a drug dealer and that the defendant had placed the drugs in the wheel well to avoid being prosecuted for possessing the drugs. *Wright v. State*, 302 Ga. App. 332, 690 S.E.2d 654 (2010).

Trial court erred in denying the defendant's motion for new trial after a jury found the defendant guilty of possession of more than one ounce of marijuana in violation of O.C.G.A. § 16-13-30(j) because the evidence adduced at trial was insufficient to show that the defendant was in sole constructive possession of the contraband when the defendant alone was charged with possessing the marijuana although the passenger in the defendant's car had equal access to the drugs, and the only legal evidence linking the defendant to the marijuana in the back seat was the defendant's spatial proximity to the marijuana; an officer's testimony concerning scales that were found in the car, to the extent it suggested some deception on the passenger's part, that deception did not give rise to the sole, reasonable inference that defendant was in sole constructive possession of the marijuana, and because the inference did not exclude every other reasonable hypothesis save the guilt of defendant, the evidence was insufficient to prove beyond a reasonable doubt that the defendant was in sole constructive possession of the marijuana. *Rogers v. State*, 302 Ga. App. 65, 690 S.E.2d 437 (2010).

Insufficient evidence of possession in vehicle. — There was insufficient evidence of constructive possession to support a conviction of possessing cocaine with intent to distribute; although a brown paper bag of cocaine was found under the passenger seat where the defendant had been sitting for over three hours, there was no evidence that the defendant knew of the contents of the bag or that the defendant had hid the bag, and the defendant's spatial proximity to the cocaine over a long period of time could not sustain the defendant's conviction. *Gillis v. State*, 285 Ga. App. 199, 645 S.E.2d 674 (2007).

Evidence was insufficient for adjudication as a delinquent for acts that would have constituted cocaine possession if committed by an adult because the cir-

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cumstantial evidence of defendant's spatial proximity to cocaine found in a car's console did not exclude every reasonable hypothesis other than constructive possession. In the Interest of J.S., 303 Ga. App. 788, 694 S.E.2d 375 (2010).

Drugs thrown from vehicles. — While a defendant claimed that the evidence was insufficient to exclude the possibility that the cocaine belonged solely to the defendant's passenger, the testimony of the passenger that the passenger dropped the drugs out of the truck after the defendant threw them in the passenger's lap was adequately corroborated under O.C.G.A. § 24-4-8 by the facts that the defendant had more than \$2,000 in the defendant's pocket and that the defendant was the owner and driver of the truck from which the drugs were thrown; the defendant was, thus, properly convicted of trafficking in cocaine under O.C.G.A. § 16-13-31(a)(1) and possession of cocaine as a lesser included offense of possession with intent to distribute. Wingfield v. State, 297 Ga. App. 476, 677 S.E.2d 704 (2009).

Evidence sufficient for conviction of possession of methaqualone with intent to distribute. — See Johnston v. State, 178 Ga. App. 219, 342 S.E.2d 706 (1986).

Evidence insufficient to establish actual or constructive possession of cocaine or methamphetamine. — See Dawson v. State, 183 Ga. App. 94, 357 S.E.2d 891 (1987); Ridgeway v. State, 187 Ga. App. 381, 370 S.E.2d 216 (1988); Johnson v. State, 245 Ga. App. 583, 538 S.E.2d 481 (2000).

Evidence was insufficient to support the defendant's convictions of possession of methamphetamine with intent to distribute as there was no evidence connecting the defendant to the drugs other than the defendant's own equal access. The drugs and paraphernalia were not found in an area exclusively used by the defendant, and the defendant's cousin had the same access to the drugs and paraphernalia. Xiong v. State, 295 Ga. App. 697, 673 S.E.2d 86 (2009).

Evidence of res gestae admissible as relevant. — Because the defendant

was charged with possessing cocaine, and other evidence showed that the defendant purchased cocaine from a man who was outside of a game room, evidence that the man dropped crack cocaine into a trash can immediately after the transaction as police detectives appeared, and that cash was found on the man, was relevant as part of the res gestae of the crime that the defendant was charged with committing; denial of the defendant's motion for mistrial was proper. Millsap v. State, 275 Ga. App. 732, 621 S.E.2d 837 (2005).

Knowing possession of cocaine. — There was no evidentiary basis upon which the jury could have concluded beyond a reasonable doubt that defendant was in knowing possession of cocaine. Evidence showed only that a certain amount of crack cocaine was found on the floorboard between the seat and the door on the passenger side of the car near where defendant had been sitting and that defendant denied seeing the owner of the car with any drugs that day. Reid v. State, 212 Ga. App. 787, 442 S.E.2d 852 (1994).

Delivery and Distribution

Construed with O.C.G.A. § 16-13-32.5. — Convictions for selling cocaine (O.C.G.A. § 16-13-30) and selling cocaine within 1000 feet of a public housing project (O.C.G.A. § 16-13-32.5) did not merge because the latter statute contains a specific non-merger provision and the intent thereof is simply to increase the punishment for violating both statutes. Harper v. State, 213 Ga. App. 611, 445 S.E.2d 300 (1994).

Admission, in trafficking trial, of evidence of prior possession conviction. — In trial for trafficking in cocaine, there was no error in admission of evidence of defendant's prior conviction for possession, since evidence of possession of a bag or container containing residue or traces of cocaine (which is the evidence upon which the prior conviction was based) does not demand the conclusion that defendant used, rather than sold or distributed, the cocaine which had at one time been in the bag. Stephens v. State, 208 Ga. App. 291, 430 S.E.2d 29 (1993).

Pregnant woman not guilty for transporting drugs to fetus. — Legis-

lature did not intend to include transmission of controlled substances to fetuses in the conduct prohibited by O.C.G.A. § 16-13-30(b). *State v. Luster*, 204 Ga. App. 156, 419 S.E.2d 32, cert. denied, 204 Ga. App. 922, 419 S.E.2d 32 (1992).

Delivery of marijuana and distribution of marijuana are both distinct violations of O.C.G.A. § 16-13-30(b) and they are not included but each may be committed exclusive of the other. *Buford v. State*, 162 Ga. App. 498, 291 S.E.2d 256 (1982).

Included offenses. — Sale and delivery under O.C.G.A. § 16-13-30(b) are not separate and distinct crimes because a sale necessarily includes a delivery of goods for a price and the sale is complete upon delivery. *Robinson v. State*, 164 Ga. App. 652, 297 S.E.2d 751 (1982).

When the trial court charged the entirety of O.C.G.A. § 16-13-30 even though the indictment alleged only possession of marijuana “with intent to distribute,” sufficient remedial instructions were given which properly confined the charge to the particular portion of the section applicable to the offense charged in the indictment, and defendant was not harmed thereby. *Caithaml v. State*, 163 Ga. App. 429, 294 S.E.2d 674 (1982).

Expert opinions. — Although the police officer who made an investigatory stop of defendant’s vehicle was not formally tendered as an expert witness, because the state laid the foundation for that officer’s opinion by eliciting the testimony about the officer’s experience and training in drug enforcement, and the defendant never objected to the officer’s opinion that the amount of marijuana the defendant possessed was more consistent with distribution rather than personal use, the evidence was admissible. *Daniels v. State*, 278 Ga. App. 263, 628 S.E.2d 684 (2006).

Marijuana in plain view following illegal entry insufficient. — Evidence of the marijuana on the table was the result of an illegal entry by the officers and, therefore, could not provide support for the search warrant. *State v. Pando*, 284 Ga. App. 70, 643 S.E. 2d 342 (2007).

Smell of marijuana upon defendants opening door. — Police officer’s lone statement that the officers smelled marijuana when the defendants opened

the door was insufficient to establish probable cause for a search warrant of the defendant’s residence. *State v. Pando*, 284 Ga. App. 70, 643 S.E. 2d 342 (2007).

Smell of marijuana on person in own driveway. — After the defendant exited a vehicle parked in the defendant’s driveway, police smelled an odor of raw marijuana on the defendant’s person and, after searching the vehicle with the driver’s consent, found marijuana residue. Therefore, the police had probable cause to arrest the defendant for possession of marijuana. *Minor v. State*, 298 Ga. App. 391, 680 S.E.2d 459 (2009).

Intent to distribute inferred from evidence. — After police officers found ten grams of cocaine, two “chunks” of hashish, and two bags containing approximately one pound of hashish in defendants’ automobiles, the quantity of the contraband found, as well as the presence of a cocaine analysis field kit, cocaine-tainted spoons, rolling papers and related drug paraphernalia, gave rise to a reasonable reference that defendants had the intent to distribute marijuana and cocaine. *Holbrook v. State*, 177 Ga. App. 318, 339 S.E.2d 346 (1985).

Evidence that the defendant was in possession of nine rocks of crack cocaine, did not have a smoking device, and did not appear to be under the influence at the time of the defendant’s arrest, and an expert’s testimony that someone with that amount of cocaine had the cocaine for the purpose of distributing the cocaine, established the defendant’s intent to distribute cocaine. *Palmer v. State*, 210 Ga. App. 717, 437 S.E.2d 490 (1993).

Defendant’s possession of 11 rocks of cocaine combined with the officer’s expert testimony that such quantity far exceeded that possessed for personal use sufficed to sustain a conviction for possessing cocaine with intent to distribute. *Myers v. State*, 268 Ga. App. 607, 602 S.E.2d 327 (2004).

Because two experienced police officers involved in defendant’s arrest testified that the packaging of the marijuana found on defendant’s person was consistent with preparing it for sale as opposed to personal use, and defendant conceded that the officers’ testimony concerning their training and experience in drug cases laid

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a proper foundation for their opinion testimony that the packaging of the marijuana was consistent with distribution, sufficient evidence supported defendant's conviction of possession with the intent to distribute marijuana. *Marshall v. State*, 270 Ga. App. 663, 607 S.E.2d 258 (2004).

Evidence supported the defendant's conviction of possession of marijuana and possession of cocaine with intent to distribute because the defendant stipulated that cocaine and marijuana were found under a sink and behind wall paneling in the house where the defendant lived, showing the defendant's constructive possession, and the amount of the drugs, and other indicia of distribution such as currency, baggies, razor blades, and scales, showed the defendant's intent to distribute. *Marshall v. State*, 273 Ga. App. 17, 614 S.E.2d 169 (2005).

Officer's testimony that the amount of cocaine in a bag in the defendant's possession was inconsistent with personal use, and that the cocaine was packaged for distribution, was sufficient to support the defendant's conviction for possessing cocaine with the intent to distribute. *Best v. State*, 279 Ga. App. 309, 630 S.E.2d 900 (2006).

Trial court did not err in denying the defendant's motion for a directed verdict of acquittal under O.C.G.A. § 17-9-1(a) in the possession with intent to distribute cocaine in violation of O.C.G.A. § 16-13-30 case; the defendant was seen fleeing into the woods wearing an unmarked black hat, a dog smelled the defendant on the same hat that was found near the defendant and that contained cocaine, and the defendant was not wearing a hat when the defendant was found. *Riggins v. State*, 281 Ga. App. 266, 635 S.E.2d 867 (2006).

Despite the defendant's challenge to the sufficiency of the evidence to support a conviction for possession of marijuana with intent to distribute that conviction was upheld on appeal given that: (1) the marijuana found in the defendant's vehicle was packaged in 17 small zip-lock bags, commonly known as a dime bags and used for the purchase and selling of

marijuana; (2) no evidence was presented which connected any other person to their possession; and (3) the jury could infer the defendant's intent from the individual packaging and number of bags found. *Gerlock v. State*, 283 Ga. App. 229, 641 S.E.2d 240 (2007).

Because: (1) the circumstantial evidence was sufficient to support a finding that the defendant intended to distribute the cocaine seized, as the defendant was in possession of a large amount of cash and 12.12 grams of cocaine divided into 33 individual packages; and (2) the arresting officer, who had been involved in thousands of drug arrests, testified that the small bags of crack cocaine ordinarily sold for \$20 each, the jury was authorized to infer and find that the defendant possessed the drugs with the intent to distribute the drugs. *Harper v. State*, 285 Ga. App. 261, 645 S.E.2d 741 (2007).

Given the evidence seized from an athletic bag taken from the back of the vehicle searched, which the defendant was driving, as well as the scales used to weigh the substance out, sufficient evidence existed to authorize a finding that the defendant intended to sell the narcotics stashed in the bag with the cocaine, which included methamphetamine. *Stroud v. State*, 286 Ga. App. 124, 648 S.E.2d 476 (2007).

Given a police officer's testimony that the drugs found at the scene came from a bag which the defendant removed from a pants pocket, the jury was authorized to find that the defendant trafficked in cocaine, possessed cocaine with intent to distribute, and possessed less than one ounce of marijuana; moreover, the amount of cocaine at issue, as well as the defendant's possession of digital scales typically used to weigh drugs for distribution, permitted the jury to discount the defendant's own testimony and find an intention to distribute the drugs. *Lipsey v. State*, 287 Ga. App. 835, 652 S.E.2d 870 (2007).

Sufficient evidence was presented to demonstrate that defendant intended to distribute crack cocaine in violation of O.C.G.A. § 16-13-30(b) based on the amount of individual pieces of crack cocaine found in baggies discovered under a tub in a bathroom to which the defendant

fled and the razor blades and plastic baggies found in the defendant's pocket. *Marshall v. State*, 295 Ga. App. 354, 671 S.E.2d 860 (2008).

There was sufficient evidence to support a defendant's conviction of being a party to the crimes of possession of marijuana and cocaine with intent to distribute in violation of O.C.G.A. §§ 16-2-20 and 16-13-30 because the defendant was holding large quantities of drugs for an accomplice in a running car outside a hotel with knowledge that the accomplice was at the hotel to make a sale. *Haywood v. State*, 301 Ga. App. 717, 689 S.E.2d 82 (2009).

Validity of indictment. — Although the indictment technically was partly inaccurate in that the state was required to prove that the defendant sold a Schedule II drug in violation of O.C.G.A. § 16-13-30(b), not that the defendant violated Schedule II, this inaccuracy did not invalidate the indictment because the facts stated in the indictment clearly indicated that the charged crime was an unlawful sale of methamphetamine, a Schedule II drug, to an undercover agent. *Freeman v. State*, 201 Ga. App. 216, 410 S.E.2d 749, cert. denied, 201 Ga. App. 903, 410 S.E.2d 749 (1991).

Pregnant woman could not have reasonably known that she could have been prosecuted for delivering or distributing cocaine to her fetus if she ingested the controlled substance while pregnant; the fetus was not a "person" within the meaning of the statute. *State v. Luster*, 204 Ga. App. 156, 419 S.E.2d 32, cert. denied, 204 Ga. App. 922, 419 S.E.2d 32 (1992).

State was not required to prove that crack cocaine was a Schedule II substance merely because the indictment alleged the defendant sold "Cocaine, a Schedule II Controlled Substance." *Wright v. State*, 232 Ga. App. 104, 501 S.E.2d 543 (1998).

Opinion evidence not allowed if it invades jury's province. — Admission of police officer's testimony identifying the defendant in photographs of alleged drug deals established a fact that jurors could decide for themselves was inadmissible and reversible error. *Mitchell v. State*, 283 Ga. App. 456, 641 S.E.2d 674 (2007).

Instruction on entrapment. — In a prosecution for trafficking in cocaine, the

trial court did not err in refusing to instruct the jury on the affirmative defense of entrapment as: (1) sufficient evidence was presented that the defendant voluntarily committed the offense upon being given the opportunity to do so; and (2) no evidence was presented to show that the informant employed undue persuasion, incitement, or deceit to induce the defendant into selling drugs; thus, the defendant's claim of ineffective assistance of counsel for failing to present evidence to support an entrapment defense was rejected and did not warrant a new trial. *Campbell v. State*, 281 Ga. App. 503, 636 S.E.2d 687 (2006).

Trial court did not err in failing to charge the jury on entrapment because there was no evidence that a deputy's undue persuasion, incitement, or deceit induced the defendant to sell cocaine or that the defendant was not predisposed to commit the crime. *Quarterman v. State*, 305 Ga. App. 686, 700 S.E.2d 674 (2010).

Trial court did not err in failing to define "intent to distribute" in jury charge. — Trial court's failure to define "intent to distribute" when charging on intent to distribute marijuana under O.C.G.A. § 16-13-30(j)(1) was not error; the term "distribute" possessed only the ordinary and common dictionary meaning and did not need to be specifically defined. The defendant failed to object to the charge without the definition, and the charge as given was not plain error excusing the failure to object under O.C.G.A. § 17-8-58(b). *Boring v. State*, 303 Ga. App. 576, 694 S.E.2d 157 (2010).

Irrelevant evidence properly excluded. — In a prosecution for possession of marijuana with intent to distribute, while the defendant was entitled to introduce relevant and admissible testimony tending to show that another person committed the crime, the trial court did not abuse the court's discretion in excluding evidence that an individual the defendant went to go visit on the night of the arrest was a known drug dealer and had been arrested on drug charges as there was no evidence tending to connect that person to the marijuana found in the defendant's vehicle; hence, the evidence failed to raise a reasonable inference of the defendant's

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innocence, and did not directly connect the other person with the corpus delicti, or show that the other person recently committed a crime of the same or similar nature. *Gerlock v. State*, 283 Ga. App. 229, 641 S.E.2d 240 (2007).

Evidence sufficient for conviction of selling heroin. — See *Russell v. State*, 226 Ga. App. 574, 486 S.E.2d 704 (1997).

Evidence sufficient for conviction of selling cocaine. — See *Bagby v. State*, 178 Ga. App. 282, 342 S.E.2d 731 (1986); *Hubert v. State*, 181 Ga. App. 684, 353 S.E.2d 612 (1987); *Golden v. State*, 184 Ga. App. 434, 361 S.E.2d 703 (1987); *Flournoy v. State*, 186 Ga. App. 774, 368 S.E.2d 538 (1988); *Grant v. State*, 258 Ga. 299, 368 S.E.2d 737 (1988); *Barrow v. City of Atlanta*, 188 Ga. App. 400, 373 S.E.2d 88 (1988); *Cleveland v. State*, 192 Ga. App. 659, 386 S.E.2d 169 (1989); *Dublin v. State*, 194 Ga. App. 606, 391 S.E.2d 451 (1990); *Woods v. State*, 210 Ga. App. 172, 435 S.E.2d 464 (1993); *Johnson v. State*, 214 Ga. App. 77, 447 S.E.2d 74 (1994); *Sorrells v. State*, 218 Ga. App. 413, 461 S.E.2d 904 (1995); *Jackson v. State*, 223 Ga. App. 207, 477 S.E.2d 347 (1996); *Copps v. State*, 223 Ga. App. 518, 478 S.E.2d 390 (1996); *Jones v. State*, 229 Ga. App. 63, 493 S.E.2d 224 (1997); *Clay v. State*, 232 Ga. App. 541, 502 S.E.2d 267 (1998); *Beard v. State*, 242 Ga. App. 742, 531 S.E.2d 168 (2000); *Jones v. State*, 243 Ga. App. 374, 533 S.E.2d 437 (2000).

Defendant who told an undercover officer that the defendant could procure crack cocaine, took the officer's the money, and attempted to procure the cocaine could be reasonably found to have been a party to the sale. *Little v. State*, 230 Ga. App. 803, 498 S.E.2d 284 (1998).

Construed most favorably to the verdict, the evidence that defendant sold cocaine to undercover officers was sufficient to allow a rational jury to find defendant guilty of selling a controlled substance, selling a controlled substance within 1,000 feet of a public housing project, and resisting arrest. *Mikell v. State*, 231 Ga. App. 85, 498 S.E.2d 531 (1998).

Evidence was sufficient to support the defendant's conviction for sale of a con-

trolled substance, cocaine, as ample evidence supported the jury's verdict that the defendant made a sale of cocaine to a confidential informant and that the substance was cocaine. *Dixon v. State*, 252 Ga. App. 385, 556 S.E.2d 480 (2001).

Evidence was sufficient to sustain the defendant's convictions for selling cocaine because, regardless of the name the defendant used, the fact remained that the confidential informant identified the defendant as the man who sold the cocaine on two occasions and the white powdered substance that was immediately turned over to police after each buy was scientifically analyzed and determined to be cocaine. *Johnson v. State*, 259 Ga. App. 452, 576 S.E.2d 911 (2003).

Defendant's conviction of possession of cocaine with intent to distribute, O.C.G.A. § 16-13-30, was supported by sufficient evidence as testimony by a police officer indicated that the defendant acted as a lookout during drug sales and took the money from the sales; the jury was free to discount testimony by another person involved in the sales that the defendant knew nothing about the sales. *Arnold v. State*, 260 Ga. App. 287, 581 S.E.2d 601 (2003).

Evidence held sufficient to support the defendant's conviction for selling cocaine when the evidence showed that the defendant directed an undercover agent to a place where a drug sale could be made, that one of the two passengers with the defendant took money from the undercover agent and gave the undercover agent crack cocaine in return, both passengers in the defendant's car testified that the money from the sale was given to defendant, and the money used in the sale, identifiable because the money had been photocopied, was found in the defendant's pockets during the defendant's arrest a short time after the sale. *Zinnamon v. State*, 261 Ga. App. 170, 582 S.E.2d 146 (2003).

Comments which an informant made on tape shortly after the defendant sold drugs to the informant and left the informant's car were part of the res gestae; the trial court did not abuse the court's discretion by admitting those comments during the defendant's trial or by allowing the

jury to read transcripts of the tape recording police made, and evidence showing that the defendant was the person who sold drugs to the informant was sufficient to sustain the defendant's conviction. *Lyons v. State*, 266 Ga. App. 89, 596 S.E.2d 226 (2004).

Evidence was sufficient to support the defendant's convictions on two counts of selling cocaine as the evidence showed that the first sale was made after an undercover officer approached the defendant's employee and the employee could only facilitate the transaction after conferring with the defendant and going into the defendant's office with defendant; it also showed that the second, separate sale was made by the defendant when the undercover officer dealt with the defendant directly and that the sale would go forward after the defendant was satisfied that the undercover officer had cash to facilitate the transaction. *Simmons v. State*, 271 Ga. App. 330, 609 S.E.2d 678 (2005).

Because the police officer witnessed the confidential informant and defendant engage in a hand-to-hand exchange and the informant returned to the officer with a rock of crack cocaine that the informant did not previously possess, sufficient evidence supported the selling cocaine conviction in violation of O.C.G.A. § 16-13-30, even though neither the defendant nor the informant was found with \$20.00 that was provided to the informant for the purchase as this went to the weight, not the sufficiency, of the evidence. *Hampton v. State*, 272 Ga. App. 565, 612 S.E.2d 854 (2005).

There was sufficient evidence to support the defendant's conviction for two counts of selling cocaine, based on two controlled buys conducted by a confidential informant, wherein the defendant was given cash in exchange for cocaine; even assuming that a concealed audio recording device produced a tape which was inadmissible on one such occasion, the evidence was still sufficient for purposes of conviction. *Brown v. State*, 274 Ga. App. 302, 617 S.E.2d 227 (2005).

Conviction for sale of cocaine in violation of O.C.G.A. § 16-13-30 was supported by sufficient evidence because the defendant could not argue that the defen-

dant acted as an informant when the defendant had no reason to believe that the buyers were law enforcement officers and knowingly gave the buyers cocaine with the intent to obtain remuneration. *Enoch v. State*, 277 Ga. App. 164, 626 S.E.2d 160 (2006).

Conviction for selling cocaine was upheld on appeal because sufficient evidence was established, via a positive field test, that defendant was in possession of cocaine that the defendant attempted to sell to an undercover officer and there was no requirement that the state should have tested the substance again at the crime lab. *Collins v. State*, 278 Ga. App. 103, 628 S.E.2d 148 (2006).

Because the testimony of a single witness was generally sufficient to establish a fact, and there was no requirement that an actual exchange of money for drugs be witnessed by more than one person or be recorded on videotape, the defendant's sale of cocaine conviction was upheld on appeal, based on a law enforcement agent's actions of handing the defendant \$40 in exchange for two pieces of a substance that tested positive for cocaine. *Hicks v. State*, 281 Ga. App. 217, 635 S.E.2d 830 (2006).

Evidence supported a defendant's conviction of selling cocaine after testimony by an undercover agent that the defendant sold the agent cocaine was corroborated by a videotape; moreover, as the defendant had been charged as a party to the crime, the state had to prove only that the defendant, as opposed to a passenger in the defendant's car and a codefendant, facilitated the sale, and the defendant did not challenge the evidence proving facilitation. *Woods v. State*, 287 Ga. App. 268, 651 S.E.2d 188 (2007).

Evidence supported the defendant's conviction of selling crack cocaine after a confidential informant testified at trial that the defendant had twice sold the informant crack cocaine, a police officer checked the informant before and after the videotaped sales, and a forensic chemist testified that the substance sold was cocaine. *Ingram v. State*, 286 Ga. App. 662, 650 S.E.2d 743 (2007).

Evidence was sufficient to support a defendant's conviction for violating the

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Georgia Controlled Substances Act by selling cocaine, in violation of O.C.G.A. § 16-13-30(b), based on an undercover officer's testimony as well as a corroborative tape recording of the drug sale transaction with the defendant; there was no requirement that the audio recording conclusively identify the defendant's voice. *McSears v. State*, 292 Ga. App. 804, 665 S.E.2d 890 (2008).

Evidence was sufficient to convict defendant of selling cocaine rather than merely being present while the defendant's stepsibling sold the cocaine because both confidential informants testified that the informants negotiated the purchase of cocaine from defendant, not from the defendant's stepsibling, and this was reflected in a videotape of the transaction that was played for the jury. Additionally, the stepsibling testified that the defendant gave the stepsibling the cocaine to give to the informants, and that the defendant received the money. *Duffie v. State*, 301 Ga. App. 607, 688 S.E.2d 389 (2009).

Defendant abandoned any challenge to the sufficiency of the evidence with regard to defendant's conviction for selling cocaine because the defendant offered no substantive argument to support the defendant's argument as required under Ga. Ct. App. R. 25(a)(3) and (c)(2); nevertheless, there was sufficient evidence for a rational trier of fact to find the defendant guilty beyond a reasonable doubt of selling cocaine. *Quarterman v. State*, 305 Ga. App. 686, 700 S.E.2d 674 (2010).

Aiding and abetting sale of cocaine.

— Evidence was sufficient to convict the defendant because the defendant aided and abetted the sale of cocaine to the undercover officer pursuant to O.C.G.A. § 16-2-20; the defendant approached an undercover officer, the defendant took money from the officer and went into a hotel room, and the defendant later returned and gave the officer cocaine. *Ware v. State*, 308 Ga. App. 24, 707 S.E.2d 111 (2011).

Evidence sufficient for conviction of selling cocaine and marijuana. — See *Smith v. State*, 178 Ga. App. 19, 341 S.E.2d 901 (1986).

Evidence sufficient to sustain conviction of conspiracy to distribute methaqualone. — See *Skinner v. State*, 182 Ga. App. 370, 355 S.E.2d 726 (1987).

Evidence sufficient to convict for sale of and trafficking in cocaine. — See *Thomas v. State*, 184 Ga. App. 318, 361 S.E.2d 280 (1987).

Evidence that the defendant agreed to sell drugs to an informant was sufficient to support defendant's conviction for selling and trafficking in cocaine. *Carter v. State*, 261 Ga. App. 204, 583 S.E.2d 126 (2003).

Evidence sufficient for conviction of trafficking and possession of controlled substances. — See *Clark v. State*, 184 Ga. App. 380, 361 S.E.2d 682, cert. denied, 184 Ga. App. 909, 361 S.E.2d 682 (1987).

Because the state presented recorded conversations between the defendant and a confidential informant (CI) to set up a drug buy, and evidence that the defendant drove to the meeting place and that the CI dropped the money for the drugs in the defendant's seat, while the defendant did not participate in the actual transaction, there was sufficient evidence to show that the defendant was a party to the transaction, and sufficient evidence to authorize the conviction. *Murphy v. State*, 272 Ga. App. 287, 612 S.E.2d 104 (2005).

Evidence supported a defendant's conviction for possession with intent to distribute a controlled painkiller as the defendant was hiding 35 painkiller pills in a plastic zip-lock bag without a label indicating a valid prescription in the waistband of the defendant's pants and the defendant gave one pill to the driver of a car; though the defendant might have been authorized to possess the painkiller, the defendant was not authorized to distribute the drug. *Atkinson v. State*, 280 Ga. App. 635, 634 S.E.2d 828 (2006).

Evidence supported a defendant's conviction for the sale of a controlled painkiller as the jury rejected a third party's testimony that the defendant had given the third party four painkiller pills and believed a police officer's testimony that on the evening of the incident, the third party told the officer that the third party paid the defendant \$20 for the four pain-

killer pills. *Atkinson v. State*, 280 Ga. App. 635, 634 S.E.2d 828 (2006).

Convictions of manufacture, distribution, and possession of methamphetamine with the intent to distribute under O.C.G.A. § 16-13-30(b), possession of ephedrine/pseudoephedrine under O.C.G.A. § 16-13-30.3(b)(1), and possession of a firearm during the commission of a felony under O.C.G.A. § 16-11-106(b)(4) were supported by the evidence. A panel van belonging to the defendant had been modified as a methamphetamine lab, was located on the defendant's property, and was powered by an electrical cord running from the defendant's trailer; everything necessary to support the production of methamphetamine was present in the vicinity of the vehicle; the defendant's name and that of the defendant's spouse had been scrawled on an interior panel of the vehicle; the defendant offered to provide any methamphetamine that a house guest wanted; uncured methamphetamine and enough ephedrine was present at the scene to make 30 to 33 grams of methamphetamine; and the defendant admitted to giving methamphetamine to others and to owning the sawed-off shotgun recovered from the panel van. *Boone v. State*, 293 Ga. App. 654, 667 S.E.2d 880 (2008).

Because a police officer properly stopped defendant's car for a suspended registration, saw what appeared to be a weapon in defendant's fanny pack, and the suspected methamphetamine was found in plain view during a limited protective search and while the officer was engaged in a lawful arrest; accordingly, defendant's constitutional rights were not violated, and defendant was properly convicted of trafficking in methamphetamine and possession of methamphetamine with intent to distribute under O.C.G.A. §§ 16-13-30(b) and 16-13-31(e). *Eaton v. State*, 294 Ga. App. 124, 668 S.E.2d 770 (2008).

Because probation officers were authorized to investigate an allegation that the defendant's son possessed drugs in violation of the son's probation, and because the officers were authorized to seize contraband falling in plain view, the evidence was sufficient to sustain the defendant's convictions for possession of methamphet-

amine with intent to distribute and trafficking in methamphetamine under O.C.G.A. §§ 16-13-30(b) and 16-13-31(e)(1). *Prince v. State*, 299 Ga. App. 164, 682 S.E.2d 180 (2009).

Evidence sufficient for conviction of possession of cocaine with intent to distribute. — See *Copeland v. State*, 228 Ga. App. 734, 492 S.E.2d 723 (1997); *Morgan v. State*, 230 Ga. App. 608, 496 S.E.2d 924 (1998); *Stewart v. State*, 232 Ga. App. 565, 502 S.E.2d 502 (1998); *McNair v. State*, 240 Ga. App. 324, 523 S.E.2d 392 (1999).

Evidence was sufficient to support the defendant's conviction for possession of cocaine with intent to distribute after the defendant was arrested on an outstanding warrant and a search of the defendant's residence and person revealed cocaine, which according to the state's expert was packaged for distribution, a razor blade, baggies of the type used to package cocaine, and a cell phone. *Taylor v. State*, 267 Ga. App. 588, 600 S.E.2d 675 (2004).

Evidence was sufficient to support defendant's conviction for possession of cocaine with intent to distribute after: (1) an informant provided information that defendant was in a certain hotel room waiting for a ride, which was corroborated; (2) the informant also stated that defendant had cocaine that defendant wished to sell; (3) when police officers stopped a car in which defendant was riding, the defendant refused to show the officers defendant's hands, and as the officers thought that defendant was reaching for a weapon, the officers subdued defendant; and (4) a pill bottle in defendant's pocket contained crack cocaine cut into small rocks for distribution, along with cash. *Mew v. State*, 267 Ga. App. 454, 600 S.E.2d 397 (2004).

Evidence was sufficient to convict the defendant of cocaine trafficking and possession of cocaine with intent to distribute because there was more evidence than the defendant's mere presence in the apartment, which was actually rented by the defendant's sister, that linked the defendant to the cocaine: (1) the jury could infer that the defendant actually lived in the apartment because the defendant claimed ownership of a television and a video

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game in the apartment; (2) it was a one-bedroom apartment to which the defendant had a key; (3) the defendant was sleeping in the bedroom when the police arrived; (4) the defendant's own statements provided additional evidence demonstrating the defendant's possession of the cocaine hidden in the kitchen cabinets; and (5) the defendant had a lot of cash on the defendant's person with large numbers of denominations that was typically used to purchase drugs. *Ballard v. State*, 268 Ga. App. 55, 601 S.E.2d 434 (2004).

Evidence supported the defendant's conviction for possession of cocaine with intent to distribute because two investigators saw the defendant put a plastic bag under a beer bottle in the woods, the plastic bag was found to contain crack cocaine, and one investigator testified that the amount in question exceeded that possessed for personal use. *Tise v. State*, 273 Ga. App. 201, 614 S.E.2d 832 (2005).

Because: (1) the defendant failed to sufficiently prove an entrapment defense, and hence, the need for disclosure of an informant's identity; (2) no error resulted in refusing to strike a juror for cause; and (3) the trial court's entrapment instruction was legally correct and did not mislead the jury, the defendant's convictions for trafficking in cocaine, in violation of O.C.G.A. § 16-13-31(a), possession of cocaine with intent to distribute, contrary to O.C.G.A. § 16-13-30(b), and two counts of use of communication facilities in committing a felony drug offense, under O.C.G.A. § 16-13-32.3, were affirmed on appeal. *Griffiths v. State*, 283 Ga. App. 176, 641 S.E.2d 169 (2006).

Evidence was sufficient to support two defendants' convictions for possession of cocaine with the intent to distribute after officers found a large amount of cash on the first defendant's person, including a recorded bill used in a controlled buy, as well as scales, small plastic bags, and scattered bags of drugs, including five individually wrapped pieces of cocaine. *Beck v. State*, 286 Ga. App. 553, 650 S.E.2d 728 (2007), *aff'd in part, rev'd in part*, 283 Ga. 352, 658 S.E.2d 577 (2008).

Defendant's convictions for possessing 28 grams or more of cocaine, possessing cocaine with intent to distribute, and possession of a firearm during the commission of a felony were upheld on appeal as sufficient evidence was presented via the direct testimony of the defendant's live-in girlfriend, which when combined with the evidence showing their joint constructive possession of the drugs and gun tended to connect and identify the defendant with the crimes charged. *Allen v. State*, 286 Ga. App. 469, 649 S.E.2d 583 (2007).

Despite the defendant's equal access claim, because: (1) the evidence sufficiently showed the defendant's ownership and possession of the vehicle where the contraband was found; (2) the similar transaction evidence showed that the defendant previously admitted possessing an almost identical array of drugs and drug processing paraphernalia; (3) the informant was a mere tipster and not a material or necessary witness; and (4) trial counsel did not render ineffective assistance, the defendant's possession of cocaine with intent to distribute conviction was upheld on appeal; thus, the trial court properly denied the defendant's motion for a directed verdict of acquittal. *Cauley v. State*, 287 Ga. App. 701, 652 S.E.2d 586 (2007).

Evidence was sufficient to support the defendant's conviction of possession of cocaine with intent to distribute: (1) crack cocaine and plastic bags were found at a hotel room where the defendant was; (2) a witness testified that the witness and the witness's cousin had gone to the hotel room and begun looking for someone to bring them cocaine; (3) the defendant brought crack cocaine there; and (4) after some was smoked, the cousin, the defendant, and another person packaged the crack into the small bags found at the scene. *Gassett v. State*, 289 Ga. App. 792, 658 S.E.2d 366 (2008).

Evidence was sufficient to support a conviction of possession of cocaine with intent to distribute when the defendant was the only person who ran when officers approached a home, an officer saw the defendant toss cocaine into the kitchen, and the defendant was the only person in the house who had a significant amount of

money. Although two witnesses testified that the witnesses had tried to buy cocaine from the defendant earlier that evening and had been told by the defendant that the defendant had none, the jury was authorized to believe the officer's testimony over the witnesses. *Thomas v. State*, 291 Ga. App. 795, 662 S.E.2d 849 (2008).

There was sufficient evidence to show that the defendant distributed cocaine based on the defendant providing a confidential informant cocaine in exchange for cash. *Beck v. State*, 292 Ga. App. 472, 665 S.E.2d 701 (2008), cert. denied, 2008 Ga. LEXIS 922 (Ga. 2008).

Defendant was properly convicted of possession of cocaine with intent to distribute, O.C.G.A. § 16-13-30(b), as the following evidence was sufficient to prove the cocaine found by police belonged to the defendant rather than a companion: (1) police found two large pieces of cocaine about four feet from where defendant placed the defendant's right hand after police ordered the defendant to lie on the ground; (2) the companion testified that the defendant bought the cocaine just before the police arrived; and (3) the defendant confessed to selling drugs. *Neugent v. State*, 294 Ga. App. 284, 668 S.E.2d 888 (2008).

Defendant's conviction for possession of cocaine with the intent to distribute was proper as an accomplice's testimony identifying defendant as the owner of a purse containing the cocaine was corroborated. *Smith v. State*, 296 Ga. App. 160, 674 S.E.2d 42 (2009).

Trial court did not err in convicting the defendant of distribution of cocaine in violation of O.C.G.A. § 16-13-30(b) and in denying the defendant's motion for directed verdict because it was not an abuse of discretion to admit a deputy's lay opinion testimony identifying the defendant on a surveillance videotape since the testimony was probative of a fact in issue and based on the deputy's observations of the defendant at the time the surveillance photograph was taken; because the deputy's testimony was sufficient to identify the defendant as the perpetrator of the crime pursuant to O.C.G.A. § 24-4-8, the evidence was sufficient to find the defen-

dant guilty of distribution of cocaine beyond a reasonable doubt. *Strickland v. State*, 302 Ga. App. 44, 690 S.E.2d 638 (2010).

Evidence was sufficient to support the defendant's conviction for possession of cocaine with intent to distribute, O.C.G.A. § 16-13-30(b), because the evidence established beyond any reasonable doubt that the defendant had the power and the intent to exercise control over the cocaine, and the state established by overwhelming circumstantial evidence that the defendant was in either constructive or actual possession of the cocaine; the defendant was found kneeling over the contraband, the jury was authorized to infer that the defendant had been "fidgeting" with a piggy bank in which 37 small bags of cocaine were hidden, and pants with the defendant's driver's license and cash were found in the same corner of the bedroom as the cocaine. *Jackson v. State*, 306 Ga. App. 33, 701 S.E.2d 481 (2010).

Evidence was sufficient to authorize the finding that the defendant was guilty of possession of cocaine with intent to distribute because evidence that cocaine was found on the ground where the defendant had been observed dropping what appeared to officers to be cocaine permitted a rational trier of fact to infer that the defendant had been in possession of the cocaine and had the intent to distribute the cocaine, which the defendant dropped when the defendant was apprehended; moreover, immediately before the defendant's apprehension, an officer had witnessed the defendant appearing to sell crack cocaine to another person. *Bush v. State*, 305 Ga. App. 617, 699 S.E.2d 899 (2010).

Evidence supported finding of intent to distribute marijuana. — Deputy's testimony supported a jury's finding that a defendant possessed marijuana with the intent to distribute in violation of O.C.G.A. § 16-13-30(j)(1); the deputy testified that the packaging and amount of marijuana (7 grams), as well as the digital scales in the defendant's bag, indicated that the defendant was selling the marijuana. *Boring v. State*, 303 Ga. App. 576, 694 S.E.2d 157 (2010).

Evidence insufficient for conviction of possession with intent to distrib-

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ute. — Evidence consisting of a reference to a hearsay tip from an unidentified source that defendant was selling drugs and the opinion testimony of the arresting police officer, not qualified as an expert, that 1.2 grams of cocaine would not normally be an amount held by a user was not sufficient to support a conviction of possession with intent to distribute. *James v. State*, 214 Ga. App. 763, 449 S.E.2d 126 (1994).

After the state introduced evidence of the defendant's prior guilty pleas for possession with intent to distribute cocaine and the sale of cocaine, but this evidence was offered to impeach the defendant when the defendant took the stand, not as evidence of similar transactions whereby the jury could infer similar motive or bent of mind, the evidence was held insufficient to support a conviction of intent to distribute. *Bethea v. State*, 220 Ga. App. 800, 470 S.E.2d 328 (1996).

Evidence showing merely that defendant possessed two bags of marijuana and had a prior conviction for possession of marijuana with intent to distribute and possession of cocaine was not sufficient for conviction. *Parris v. State*, 226 Ga. App. 854, 487 S.E.2d 690 (1997).

Trial court was not authorized to find the defendant intended to distribute drugs since the state produced no evidence that defendant had scales, guns, cash, drug packaging materials, or a large quantity of marijuana, and did not introduce any evidence of prior drug sales by the defendant, or any testimony that the defendant was observed selling or attempting to sell drugs. *Clark v. State*, 245 Ga. App. 267, 537 S.E.2d 742 (2000).

State failed to prove defendant was guilty of possession of cocaine with intent to distribute as to a substance found in defendant's car; thus, defendant's conviction was reversed since: (1) defendant did not state that the substance was cocaine in defendant's post-arrest statement; (2) the police expert did not identify the substance as cocaine, but as suspected cocaine; (3) no tests were performed on the substance; (4) the photographs admitted into evidence did not establish that the

substance was cocaine; and (5) codefendant's testimony and the purported statement by the confidential informant did not identify the substance found in defendant's car. *Cooper v. State*, 258 Ga. App. 825, 575 S.E.2d 691 (2002), cert. denied, 540 U.S. 888, 124 S. Ct. 270, 157 L. Ed. 2d 160 (2003).

Evidence did not support the defendant's conviction for possession of marijuana with intent to distribute as the mere fact that a package of marijuana was addressed, but not delivered, to an apartment leased by defendant did not tie the defendant to the drugs; the evidence was circumstantial and it was equally plausible that the codefendants were independently dealing in marijuana. *Patten v. State*, 275 Ga. App. 574, 621 S.E.2d 550 (2005).

There was insufficient evidence of intent to convict the defendant of possession of cocaine with intent to distribute under O.C.G.A. § 16-13-30, as there was no evidence that the cocaine had been divided and packaged for individual sale or as to a personal use quantity; thus, the circumstantial evidence did not permit a rational trier to exclude the reasonable hypothesis, pursuant to O.C.G.A. § 24-4-6, that the defendant intended to use the cocaine. *Florence v. State*, 282 Ga. App. 31, 637 S.E.2d 779 (2006).

While the evidence was sufficient to convict the defendant of possession of cocaine found in a pill bottle in the defendant's vehicle, it was insufficient to prove that the defendant intended to distribute the cocaine under O.C.G.A. § 16-13-30(b) because the state produced no evidence that the defendant had scales, cutting implements, weapons, a large amount of cash, a customer list, or drug packaging materials; there was no evidence of prior convictions of drug possession with intent to distribute, no testimony that the defendant was seen selling or trying to sell drugs, no expert testimony that the amount of drugs seized was inconsistent with personal use, and no evidence as to the amount of cocaine seized. Under O.C.G.A. § 24-4-6, storing drugs in a pill bottle, and possessing an unidentified number of sales-size pieces of the drug, without more, equally supported the hy-

pothesis that the person found with the drugs was a user rather than a dealer. *Hicks v. State*, 293 Ga. App. 830, 668 S.E.2d 474 (2008).

Codefendant's convictions for possession of cocaine with intent to distribute, O.C.G.A. § 16-13-30(b), and possession with intent to distribute a controlled substance within 1,000 feet of a housing project, O.C.G.A. § 16-13-32.5(b), was unsupported as a matter of law, and the trial court erred by denying the defendant's motion for a directed verdict of acquittal because the circumstantial evidence and the reasonable inferences derived therefrom were insufficient to connect the codefendant to the cocaine, which was found in an upstairs bedroom occupied by the codefendants; no evidence was introduced to show that the codefendant resided in the apartment where the cocaine was found, which could authorize an inference that the codefendant possessed the property therein. *Jackson v. State*, 306 Ga. App. 33, 701 S.E.2d 481 (2010).

Supplying drugs for sex with minor supported conviction. — Evidence was sufficient to support a conviction of distribution of cocaine under O.C.G.A. § 16-13-30 because the 15-year-old victim admitted that, on several of the occasions when having sex with defendant, the defendant had supplied the victim with crack cocaine, which they had smoked together. *Watson v. State*, 302 Ga. App. 619, 691 S.E.2d 378, cert. denied, U.S. , 131 S. Ct. 328, 178 L. Ed. 2d 213 (2010).

Evidence sufficient to support convictions for both sale of cocaine and possession of cocaine with intent to distribute. — Because the state presented sufficient evidence through: (1) the testimony of an informant and the agent conducting a controlled buy from the defendant involving the informant; (2) the field tests done on the substance purchased and seized as a result of a search warrant; and (3) the results of the state's crime lab tests, the defendant's convictions for the sale of cocaine and possession with intent to distribute cocaine were upheld on appeal. Moreover, the latter conviction was further supported by testimony from the agent that the quantity

and unique packaging of the cocaine found in the location searched were inconsistent with mere personal consumption. *Johnson v. State*, 289 Ga. App. 206, 656 S.E.2d 861 (2008).

Charge on "specific intent" not required. — In a prosecution for possession of cocaine with intent to distribute, the trial court correctly rejected a requested charge necessitating that the state prove a "specific intent" to commit the crime. *Price v. State*, 223 Ga. App. 807, 478 S.E.2d 915 (1996).

Similar transaction evidence properly admitted. — In a prosecution for possession of cocaine with intent to distribute, the trial court properly admitted similar transaction evidence as the evidence showed that the defendant previously admitted possessing an almost identical array of drugs and drug processing paraphernalia. *Cauley v. State*, 287 Ga. App. 701, 652 S.E.2d 586 (2007).

Defendant's three prior drug offenses involved the sale of \$20 worth of crack cocaine to undercover officers or informants during drug investigations in the same neighborhood. Therefore, these similar transactions were admissible to show the defendant's bent of mind, course of conduct, and intent to sell cocaine in violation of O.C.G.A. § 16-13-30(b). *Morrison v. State*, 300 Ga. App. 405, 685 S.E.2d 413 (2009).

New trial ordered after evidence improperly admitted. — Because the seizure of cash found on the defendant's person was conducted based on a lawful arrest for a domestic violence act of assault, given information by the defendant's girlfriend, the girlfriend's obvious injuries, and the defendant's attempt to flee, the trial court properly denied suppression of the evidence; however, because the defendant maintained a reasonable expectation of privacy in the curtilage surrounding the defendant's residence, absent a warrant or exigent circumstances, suppression of cocaine found in that area was erroneously denied, and as such the defendant was erroneously denied a new trial. *Rivers v. State*, 287 Ga. App. 632, 653 S.E.2d 78 (2007).

Custodial statement by defendant properly admitted. — Custodial state-

Delivery and Distribution (Cont'd)

ment in which the defendant admitted having turned over an electric meter used in the manufacture of drugs was properly admitted at the defendant's trial and did not improperly introduce character evidence against the defendant since even though a defendant is not charged with every crime committed during a criminal transaction, every aspect relevant to the crime charged may be presented at trial. *Ward v. State*, 285 Ga. App. 574, 646 S.E.2d 745 (2007).

Conflicting descriptions of the defendant in officer's report. — Conflicting descriptions of the defendant given by a deputy in reports summarizing incidents where the deputy purchased drugs affected the weight of the deputy's testimony, not the testimony's admissibility, and the jury was entitled to overlook the discrepancies and believe the deputy when the deputy testified that the deputy bought cocaine from the defendant. *Mathis v. State*, 265 Ga. App. 541, 594 S.E.2d 737 (2004).

Chain of custody of methamphetamine sufficiently established. — Because the state met the state's burden in establishing a chain of custody by sufficiently demonstrating that the evidence seized was the same as that which was admitted at trial, the defendant was not entitled to a directed verdict as to a charge of possession of methamphetamine with intent to distribute based on this ground. *Cook v. State*, 287 Ga. App. 81, 650 S.E.2d 757 (2007), cert. denied, 2008 Ga. LEXIS 127 (Ga. 2008).

Evidence sufficient to support conviction for possession of methamphetamine with intent to distribute. — Defendant's conviction for possession of methamphetamine with intent to distribute was upheld on appeal since sufficient evidence showed that: (1) the trial court properly admitted similar transaction evidence despite addressing all of the Williams factors, but preserving the defendant's confrontation rights; (2) the defendant's trial counsel was not ineffective; and (3) no Brady violation occurred. *Hinton v. State*, 290 Ga. App. 479, 659 S.E.2d 841 (2008).

Evidence that when a defendant's vehicle was stopped, the defendant was in possession of 14 grams of methamphetamine packaged in small plastic bags, other illegal drugs, and a digital scale, along with testimony from an experienced officer that the packaging indicated an intent to sell the methamphetamine, was sufficient to support the defendant's conviction for possession with intent to distribute under O.C.G.A. § 16-13-30(b). *Driscoll v. State*, 295 Ga. App. 5, 670 S.E.2d 824 (2008).

State presented evidence that the officers found about 14 grams of methamphetamine crystals hidden in the defendant's shoe, which was a large amount of methamphetamine, and the state showed the defendant's intention to sell or distribute the methamphetamine; the defendant also gave a statement to a police officer admitting that the defendant possessed the methamphetamine and intended to sell the methamphetamine. Thus, the evidence was sufficient for the trial court to find beyond a reasonable doubt that the defendant was guilty of possession of methamphetamine with intent to distribute in violation of O.C.G.A. § 16-13-30(b). *Boyd v. State*, 300 Ga. App. 455, 685 S.E.2d 319 (2009), cert. denied, No. S10C0309, 2010 Ga. LEXIS 204 (Ga. 2010).

Evidence was sufficient to convict the defendant of trafficking in methamphetamine under O.C.G.A. § 16-13-30(a) because testimony of drug enforcement agents and co-indictees as well as drugs, money, and drug paraphernalia obtained during a search established that the defendant engaged in three sales of this contraband. *Williamson v. State*, 300 Ga. App. 538, 685 S.E.2d 784 (2009), cert. denied, No. S10C0387, 2010 Ga. LEXIS 191 (Ga. 2010).

Evidence was sufficient to convict the defendant of conspiracy to distribute methamphetamine in violation of O.C.G.A. § 16-13-30(b) because methamphetamine was found in a trailer on the defendant's property, which the defendant occupied and controlled, a known drug dealer was found on the defendant's premises, who had been "fronting" the defendant and the defendant's spouse

methamphetamine on a weekly basis, and the defendant's spouse kept a book regarding their sales from the drugs supplied by the dealer. *Peacock v. State*, 301 Ga. App. 873, 689 S.E.2d 853 (2010).

Evidence was sufficient to find beyond a reasonable doubt that the defendant was guilty of manufacturing methamphetamine, O.C.G.A. § 16-13-30(b), conspiring to possess methamphetamine, O.C.G.A. § 16-13-3, and possessing methamphetamine, § 16-13-30(a) because the state was not required to show that the defendant was in sole or actual possession of the methamphetamine but could establish the element of possession by showing that the defendant was in joint constructive possession of the contraband; the evidence allowed for a finding that the defendant lived at the residence where the methamphetamine was found, that methamphetamine was found in the master bedroom atop the same dresser as a driver's license bearing the defendant's name and the residential address, that stored in a lockbox underneath the bed in that room were recipes for producing methamphetamine or a similar substance, along with digital scales associated with the drug trade, and that the defendant's residential premises was being used as a clandestine methamphetamine lab. *Edwards v. State*, 306 Ga. App. 713, 703 S.E.2d 130 (2010).

Sufficient evidence prison guard intended to distribute drugs in prison.

— Evidence supported convictions of possession of cocaine with intent to distribute, possession of marijuana with intent to distribute, and crossing a prison guard line with drugs when the defendant, a corrections officer, was found with a cookie box containing drugs. Although the defendant claimed to be unaware of the contents of the package, none of the people the defendant named as being involved in the transaction were proven to exist, and the jury was authorized to infer that it was unreasonable for a corrections officer to take a suspicious package from an unknown person into a prison to give to an unknown recipient; furthermore, given the large amount and variety of contraband, the contraband's high street value, and that the defendant was taking the

contraband inside a heavily guarded prison facility, the jury was authorized to infer that the defendant intended to distribute the contraband to others instead of using the contraband personally. *Bradley v. State*, 292 Ga. App. 737, 665 S.E.2d 428 (2008).

Marijuana

"Manufacture." — O.C.G.A. § 16-13-30(j)(1) applies to the cultivation or planting of marijuana, and it is therefore error for a trial court to conclude that "one cannot manufacture marijuana by growing same." *State v. Hunt*, 201 Ga. App. 327, 411 S.E.2d 273 (1991), cert. denied, 201 Ga. App. 904, 411 S.E.2d 273 (1991).

Marijuana is not a controlled substance for the purpose of a prosecution under O.C.G.A. § 16-11-106 for possession of a firearm during the commission of a "crime involving the possession, manufacture, delivery, distribution, dispensing, administering, selling, or possession with intent to distribute any controlled substance." *Asberry v. State*, 220 Ga. App. 40, 467 S.E.2d 225 (1996).

Question of whether marijuana is a harmful drug is essentially a scientific one. *Blincoe v. State*, 231 Ga. 886, 204 S.E.2d 597 (1974).

If marijuana is a dangerous drug, state has right to make the drug's sale and use criminal. *Blincoe v. State*, 231 Ga. 886, 204 S.E.2d 597 (1974).

Legal capability of certain pharmacists to sell marijuana to certain customers is not an element of the offense of selling marijuana. *May v. State*, 179 Ga. App. 736, 348 S.E.2d 61 (1986).

To authorize felony punishment, jury must find possession of more than one ounce of marijuana. — When the evidence is in dispute as to the amount of marijuana defendant possessed, the jury must be instructed that to authorize felony punishment the jury must find possession of more than one ounce. *Jones v. State*, 151 Ga. App. 562, 260 S.E.2d 555 (1979).

Weight of plants. — Testimony of expert as to the weight of the marijuana produced by a given quantity of marijuana plants which were seized, together with

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photographs of the plants, is sufficient to establish the weight of the plants which had been destroyed upon confiscation. *Evans v. State*, 176 Ga. App. 818, 338 S.E.2d 48 (1985).

Identification of marijuana. — Identification testimony regarding the identity of illegal drugs, when made by experienced officers, is admissible, and expert testimony based on scientific tests is not required to establish that a substance is marijuana. *Jones v. State*, 268 Ga. App. 246, 601 S.E.2d 763 (2004).

During testimony, the defendant referred to a substance as marijuana, and this, together with an officer's testimony, established the evidence was marijuana beyond a reasonable doubt and was sufficient for the jury to find the defendant guilty of possession of marijuana. *Dulcio v. State*, 297 Ga. App. 600, 677 S.E.2d 758 (2009).

Sufficiency of evidence. — Trial court did not err in denying defendant's motion for a directed verdict on the charge of possession of marijuana with intent to distribute, a codefendant testified that the marijuana belonged to defendant, and no other evidence showed that the large amount of marijuana, contained in five bags total, was for defendant's personal use. *Pitts v. State*, 260 Ga. App. 553, 580 S.E.2d 618 (2003).

Convictions for trafficking in cocaine and possession of marijuana with intent to distribute were supported by sufficient evidence which showed that defendant was the sole lessee and resident of an apartment where nearly 500 grams of cocaine were found, along with several bags of marijuana packaged for resale, and that defendant had recently sold cocaine, which came from a blue bag holding 111 grams of cocaine, which was also found in the apartment. *Vance v. State*, 268 Ga. App. 556, 602 S.E.2d 276 (2004).

There was sufficient evidence to support convictions of possession of marijuana with intent to distribute and possession of a handgun during commission of a crime after an undercover officer met the defendant in the defendant's car, the defendant had a handgun beside the defendant, the

officer showed the defendant the money that the officer showed brought to buy ten pounds of marijuana, and the defendant showed the officer a sample of the marijuana and told the officer that the marijuana was in a nearby van; after the transaction was called off because the officer would not give the defendant the money before receiving the marijuana, police found ten pounds of marijuana in the van and the handgun in the defendant's car. *Davis v. State*, 285 Ga. App. 460, 646 S.E.2d 342 (2007).

There was sufficient evidence to support a defendant's conviction for possession of more than an ounce of marijuana as although the evidence of the defendant's constructive possession of the marijuana found in a shoebox in the backseat of the car the defendant was operating was circumstantial, it was within the jury's province to exclude every other reasonable hypothesis other than the defendant's guilt. The car owner testified that the owner did not possess the vehicle for over three months and the defendant's passenger testified that the marijuana did not belong to the passenger, thus, the jury was entitled to find that the proved facts excluded the possibility that the car owner left the marijuana on the backseat where the marijuana had gone unnoticed for several months or that the passenger left the marijuana in the backseat. *Prather v. State*, 293 Ga. App. 312, 667 S.E.2d 113 (2008).

In a prosecution for two counts of possession of less than one ounce of marijuana, evidence of the defendant's three prior convictions for the same offense was properly admitted. Given that the defendant denied possessing marijuana in two of the prior cases and in the case at bar, the prior transactions were probative of the defendant's bent of mind and course of conduct. *Neal v. State*, 297 Ga. App. 223, 676 S.E.2d 864 (2009).

Evidence that a defendant showed officers a can in the defendant's kitchen cupboard with a false bottom that concealed 33.18 grams of cocaine and 19.8 grams of marijuana was sufficient to support the defendant's convictions for trafficking in cocaine and possession of marijuana in violation of O.C.G.A. §§ 16-13-30(j)(1)

and 16-13-31(a)(1)(A). The jury was charged on equal access and clearly rejected the defendant's defense that a confidential informant working as a handyman at the defendant's home could have placed the drugs there. *Daniel v. State*, 306 Ga. App. 48, 701 S.E.2d 499 (2010).

Constructive possession. — Because the state showed that, in addition to a juvenile's close proximity to a bag of marijuana, the juvenile confessed to an intent to purchase the marijuana, and had money equal to the marijuana's approximate street value, such established a sufficient connection between the juvenile and the marijuana to support an adjudication for the marijuana's constructive possession, contrary to O.C.G.A. § 16-13-30. In the Interest of B.J.C., 281 Ga. App. 228, 635 S.E.2d 833 (2006).

Sufficient evidence supported the defendant's convictions of trafficking in cocaine, possession of marijuana with intent to distribute, and possession of cocaine with intent to distribute within 1,000 feet of a school, despite an argument on appeal that no evidence of either actual or constructive possession was presented as: (1) sufficient additional evidence, albeit circumstantial, tied the defendant to those crimes and established more than the defendant's mere presence to the drugs seized; and (2) the proved facts excluded any reasonable hypotheses that a crime could have been committed by anyone else. *Slaughter v. State*, 282 Ga. App. 276, 638 S.E.2d 417 (2006).

Evidence supported an adjudication of juvenile delinquency based on possession of marijuana; an officer saw the juvenile defendant searching the floorboard of a car, and marijuana was later found on the floorboard in the area where the defendant had been searching. In the Interest of Q.P., 286 Ga. App. 225, 648 S.E.2d 731 (2007).

Definition of marijuana under § 16-13-25. — Since a prosecution for misdemeanor possession of marijuana cannot be instituted on the basis of a blood or urine test which shows "positive" for marijuana, because such positive showings will be based upon the presence of THC "without the morphological features" of the marijuana plant and are thus ex-

cluded from the definition of "marijuana" under O.C.G.A. § 16-13-25, prosecutions for possession of marijuana based upon positive blood or urine samples must be brought as a felony prosecution for possession of a Schedule I drug, i.e. THC. *Cronan v. State*, 236 Ga. App. 374, 511 S.E.2d 899 (1999).

Jury need not make special finding as to amount where evidence not in conflict. — When evidence is not in conflict as to amount, it is not necessary for the court to charge the jury that the jury must find amount specially. *Coffey v. State*, 141 Ga. App. 254, 233 S.E.2d 243 (1977).

Pleading amount of marijuana possessed and first offender status. — While it is necessary to plead amount of marijuana possessed and whether the defendant is a first offender when trial is to be had in an inferior court having jurisdiction over misdemeanors only, there is no requirement to plead this matter in an indictment or accusation when trial is to be had in a superior court which has concurrent jurisdiction over felonies and misdemeanors. *Stinnett v. State*, 132 Ga. App. 261, 208 S.E.2d 16 (1974).

When the jury asked the court to distinguish possession of marijuana from the sale of marijuana, and the trial court responded that the defendant was accused of selling marijuana and then read O.C.G.A. § 16-13-30(j)(1) to the jury, it was held that it is not usually cause for a new trial that an entire Code Section is given, even though a part of the charge may be inapplicable under the facts in evidence, and the conviction of selling marijuana was affirmed. *McBurse v. State*, 182 Ga. App. 759, 357 S.E.2d 144 (1987).

Proof that proffered marijuana same as that seized. — State showed with "reasonable certainty" that marijuana offered into evidence was same as that seized. *Williams v. State*, 165 Ga. App. 708, 302 S.E.2d 609 (1983).

Testimony of arresting officer sufficient for felony possession of marijuana sufficient. — Defendant was properly convicted of felony possession of marijuana as a deputy sheriff testified that the defendant admitted that the mar-

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ijuana found in the trunk of a rental car belonged to the defendant. Even though the defendant denied saying this, or possessing the drugs, the credibility of witnesses was for the jury to determine, and under O.C.G.A. § 24-4-8, the testimony of a single witness was sufficient to establish the facts. *McKinney v. State*, 293 Ga. App. 419, 667 S.E.2d 210 (2008).

As a defendant's landlord could not give valid consent to search the defendant's trailer to find the subject of an arrest warrant who did not live there, and no emergency required the subject's immediate arrest, an officer's warrantless entry into the defendant's trailer violated the Fourth Amendment. Therefore, the plain view doctrine did not apply, and the officer could not seize marijuana plants found in the trailer. *Looney v. State*, 293 Ga. App. 639, 667 S.E.2d 893 (2008).

Evidence sufficient for conviction of possession of marijuana. — See *Johnston v. State*, 178 Ga. App. 219, 342 S.E.2d 706 (1986); *Kelly v. State*, 181 Ga. App. 605, 353 S.E.2d 92 (1987); *Akins v. State*, 184 Ga. App. 441, 361 S.E.2d 707 (1987); *Rich v. State*, 188 Ga. App. 287, 372 S.E.2d 670 (1988); *Crawford v. State*, 233 Ga. App. 323, 504 S.E.2d 19 (1998); *Driver v. State*, 240 Ga. App. 513, 523 S.E.2d 919 (1999); *Brown v. State*, 244 Ga. App. 440, 535 S.E.2d 785 (2000).

When there was more evidence to connect defendant to the marijuana than that of mere spatial proximity or presence as the marijuana was hidden during the transport in the patrol vehicle to the station by one of the three codefendants, and when defendant admitted that defendant knew the owner of the marijuana, although the defendant refused to identify such person and there was evidence that marijuana had been used in defendant's vehicle and that defendant had recently used marijuana there was sufficient evidence to find defendant guilty of joint constructive possession, or at least as a party to the crime. *Harvey v. State*, 212 Ga. App. 632, 442 S.E.2d 478 (1994).

Based on the defendant's statements regarding the "dope" in the defendant's apartment and the fact that the defendant

waived the defendant's claim that the state failed to prove that the substance was marijuana by failing to object to the state's alleged failure to lay a foundation for the officer's testimony that it was marijuana, the evidence was sufficient to support the defendant's conviction for possession-of-marijuana. *Ballard v. State*, 268 Ga. App. 55, 601 S.E.2d 434 (2004).

Evidence was sufficient to sustain defendant's convictions for possession of marijuana and possession of cocaine with intent to distribute; officers testified that they recovered the 34 bags of cocaine and one bag of marijuana that the defendant threw out the window of a car, as well as two bags of cocaine the defendant still had and that such a large amount of cocaine individually wrapped was consistent with an intent to distribute. *Mayo v. State*, 277 Ga. App. 282, 626 S.E.2d 245 (2006).

Evidence supported a defendant's conviction of bringing stolen property to Georgia, eluding an officer, and possessing marijuana as a party, if not as a conspirator, since: (1) the defendant discussed with the defendant's boyfriend what would happen if they were apprehended by the police; (2) the boyfriend gave the defendant a handgun after the boyfriend stole a new gun and the defendant packed two guns with the defendant's personal items and the ski masks; (3) the defendant suspected that the truck was stolen, refused to ask about the truck's origin, saw the stolen gun on the seat of the truck, observed two gas drive-offs, ate stolen food, smoked shared marijuana repeatedly, and sat next to the glove compartment where the marijuana lay; and (4) the defendant was silent during the police pursuits, saw the defendant's boyfriend retrieve a stolen handgun just prior to an assault of a police officer, did not hinder the boyfriend or warn the police, lied to the police to cover up the matter, and referred to the entire affair as having "fun for a minute." *Michael v. State*, 281 Ga. App. 289, 635 S.E.2d 790 (2006).

Evidence supported the defendant's conviction of possession of less than one ounce of marijuana, O.C.G.A. § 16-13-30(a), as the state presented direct evidence of the defendant's admission that the contraband belonged to the defen-

dant and that some marijuana was found in the defendant's bedroom; the conflicts in the evidence in this regard presented a question for the jury's resolution. *Wheeler v. State*, 307 Ga. App. 585, 705 S.E.2d 686 (2011).

Evidence sufficient to sustain conviction for possession with intent to distribute marijuana. — See *Wiley v. State*, 178 Ga. App. 136, 342 S.E.2d 342 (1986); *Rivers v. State*, 178 Ga. App. 310, 342 S.E.2d 781 (1986); *Brooks v. State*, 190 Ga. App. 430, 379 S.E.2d 228 (1989); *Ward v. State*, 195 Ga. App. 166, 393 S.E.2d 21 (1990); *King v. State*, 238 Ga. App. 575, 519 S.E.2d 500 (1999); *Buckholts v. State*, 247 Ga. App. 697, 545 S.E.2d 99 (2001).

Presence of the marijuana in defendant's home, coupled with the quantity of marijuana and the presence of scales used to weigh drugs, was sufficient evidence of possession of marijuana with an intent to distribute. *Midura v. State*, 183 Ga. App. 523, 359 S.E.2d 416 (1987).

When drugs were found in the area of a car where the defendant sat, when the evidence showed that the driver of the car was trying to buy drugs from the defendant, and when the driver denied to an officer that the seized drugs belonged to the defendant, the defendant's conviction of possessing drugs with intent to distribute was supported by the evidence. *Johnson v. State*, 268 Ga. App. 808, 602 S.E.2d 840 (2004).

Evidence was sufficient to convict defendant of possession of marijuana with the intent to distribute based on the testimony of an officer and a forensic chemist that the leafy substance that was found on the floorboard of the truck that defendant used was in fact marijuana. *Marion v. State*, 268 Ga. App. 699, 603 S.E.2d 321 (2004).

Evidence was sufficient to support a conviction for possession of marijuana with the intent to distribute given that the defendant was riding as a passenger in a vehicle that was stopped, the defendant immediately informed the police where individually packaged bags of marijuana could be found within the car, the defendant had been previously convicted of a similar offense a few months earlier, and

the driver indicated that the drugs belonged to the defendant. *Williams v. State*, 277 Ga. App. 106, 625 S.E.2d 509 (2005).

There was sufficient evidence that the defendant was guilty of possessing with intent to distribute 40.1 pounds of marijuana in violation of O.C.G.A. § 16-13-30(j); the defendant's intent to distribute was proved by evidence that the amount of marijuana was far in excess of that possessed for personal use, and the circumstantial evidence showed a connection between defendant and the marijuana other than spatial proximity. *Taylor v. State*, 285 Ga. App. 697, 647 S.E.2d 381 (2007), cert. denied, 2007 Ga. LEXIS 655 (Ga. 2007).

Evidence, although circumstantial, was sufficient to connect the defendant to the house where drugs were found; thus, it was sufficient to support convictions of trafficking in cocaine and possession of marijuana with intent to distribute. Although others might have been present on the property on various unspecified occasions, the defendant was allowed by the owner to use the house, had been seen at the residence by police on previous occasions, had a vehicle on the premises, and hurriedly walked away from officers when the officers arrived; the evidence also showed that no other persons were present when officers executed the search warrant. *Clyde v. State*, 298 Ga. App. 283, 680 S.E.2d 146 (2009).

Evidence was sufficient to establish the defendant's conviction for possession of marijuana with intent to distribute in violation of O.C.G.A. § 16-13-30(j)(1) because during the execution of a search warrant at the defendant's residence, police officers seized eighteen baggies of marijuana individually packaged in a manner that was indicative of possession with intent to distribute, and the residence belonged to the defendant, which permitted an inference that the defendant controlled the premises and was in constructive possession of the drug contraband; the circumstantial evidence implied the defendant's consciousness of guilt and further supported the defendant's conviction because, when the officers approached the residence, the defendant fled inside to the closet area where the drugs

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were later located, and when the officers searched the closet, the officers discovered that the jacket the defendant had been wearing was placed over the box containing the drugs. *Williams v. State*, 303 Ga. App. 222, 692 S.E.2d 820 (2010).

Trial court did not err in denying the defendant's motion for a directed verdict after a jury found the defendant guilty of trafficking in cocaine, O.C.G.A. § 16-13-31(a)(1)(A), and possession of marijuana with intent to distribute, O.C.G.A. § 16-13-30(j), because the verdict was not insupportable as a matter of law; in addition to evidence that the defendant rented a hotel room where illegal drugs were found, had a key to the suite, and was going to the suite at a time when a great quantity and variety of drugs were in open view, there was other evidence linking the defendant to the contraband found there, including the defendant's suspicious behavior upon seeing officers near the suite and the presence of the defendant's personal property inside the suite. *Glass v. State*, 304 Ga. App. 414, 696 S.E.2d 140 (2010).

Evidence sufficient to convict for manufacture of marijuana. — Evidence supported conviction for manufacture of marijuana even though laboratory expert could not definitively state that certain alleged marijuana plants on the manufacturing premises were marijuana. *Burch v. State*, 213 Ga. App. 392, 444 S.E.2d 370 (1994).

Evidence sufficient to support conviction for selling marijuana. — See *Puckett v. State*, 178 Ga. App. 143, 342 S.E.2d 487 (1986); *Byrd v. State*, 182 Ga. App. 284, 355 S.E.2d 666 (1987).

Evidence supported the defendant's conviction for selling marijuana after undercover officers saw the defendant sell marijuana from a distance of 10-15 feet, the buyer dropped a bag of marijuana when arrested, and when officers later approached the defendant, defendant said, "I didn't sell my man no weed." *McKay v. State*, 234 Ga. App. 556, 507 S.E.2d 484 (1998).

Defendant's convictions for simple battery and the sale of marijuana were up-

held on appeal as sufficient evidence was presented that the defendant spat in the face of another and the undercover officer who the defendant sold the marijuana to testified regarding the sale; further, the trial court properly admitted similar transaction evidence as the evidence was probative of defendant's bent of mind to become belligerent with police officers when arrested. *Williams v. State*, 287 Ga. App. 40, 651 S.E.2d 347 (2007).

Evidence insufficient to convict for selling marijuana. — Prior inconsistent statement by marijuana dealer charged with selling marijuana in violation of O.C.G.A. § 16-13-30(j)(1) that defendants were involved in selling marijuana, and evidence that defendants were in close proximity to seized marijuana did not establish that defendants were party to crime of violating subsection (j)(1). *Oldwine v. State*, 184 Ga. App. 173, 360 S.E.2d 915 (1987).

Evidence insufficient for conviction for possession with intent to distribute. — Although the trial court properly admitted evidence of similar transactions, given the quantity of marijuana and methamphetamine found, the evidence was insufficient to convict defendant of possession with intent to distribute under O.C.G.A. § 16-13-30(b). *Ryan v. State*, 277 Ga. App. 490, 627 S.E.2d 128 (2006).

Evidence insufficient for possession conviction. — Evidence did not support a defendant juvenile's adjudication of delinquency for possession of marijuana as: (1) a substance an officer said was marijuana was found in a truck in which the defendant juvenile was riding; (2) the defendant juvenile did not own the truck; (3) the marijuana was not found where the defendant juvenile had been sitting; and (4) the state did not have the bag tested at the crime lab and therefore there was no testimony that the substance found in the truck had actually tested positive for marijuana. In the Interest of C.C., 280 Ga. App. 590, 634 S.E.2d 532 (2006).

Evidence was insufficient to support the defendant's conviction of possession of marijuana as there was no evidence connecting the defendant to the drugs other than the defendant's own equal access.

The drugs and paraphernalia were not found in an area exclusively used by the defendant, and the defendant's cousin had the same access to the drugs and paraphernalia. *Xiong v. State*, 295 Ga. App. 697, 673 S.E.2d 86 (2009).

Evidence sufficient to convict for attempt to possess marijuana. — There was sufficient evidence to support a defendant's conviction for attempting to possess marijuana based on the evidence that the defendant solicited undercover officers and asked for marijuana and attempted to pay for the marijuana. The defendant's rejection of the first bag the undercover officers gave did not establish abandonment of the crime since the defendant asked for a second bag. *Collins v. State*, 297 Ga. App. 364, 677 S.E.2d 407 (2009).

Necessity of jury instruction on lesser included offense of misdemeanor possession. — Defendant was improperly convicted of purchasing marijuana under O.C.G.A. § 16-13-30(j)(1) because the trial court should have given a jury instruction on the lesser included offense of misdemeanor possession of less than one ounce of marijuana under O.C.G.A. § 16-13-2(b) as the defendant did not pay for the marijuana and testified that the defendant did not intend to purchase the marijuana. *Johnson v. State*, 296 Ga. App. 697, 675 S.E.2d 588 (2009), cert. denied, No. S09C1191, 2009 Ga. LEXIS 420 (Ga. 2009).

Inconsistent verdict. — Guilty verdict for charge of possession of marijuana

with intent to distribute was not inconsistent where the jury simply broke down the verdict into the two primary findings necessary to find defendant guilty of the offense; in any event, simple possession of marijuana is a lesser-included offense of possession of marijuana with the intent to distribute, and there is nothing improper with a jury finding a defendant guilty of both the charged offense and a lesser-included offense. *Ellison v. State*, 265 Ga. App. 446, 594 S.E.2d 675 (2004).

No speedy trial violation. — Upon the appellate court's analysis of the four *Barker v. Wingo* factors, given the negative weight of one of two factors against the state, specifically, the reason for the delay, and the defendant's failure to show prejudice and timely assertion of a speedy trial right, no abuse of discretion resulted by the trial court's denial of a motion to dismiss the indictments filed against the defendant, charging the sale of cocaine and marijuana, on speedy trial grounds. *Simmons v. State*, 290 Ga. App. 315, 659 S.E.2d 721 (2008).

Maximum punishment provisions of section apply to charge of conspiracy. — If defendants are indicted under general conspiracy statute, maximum punishment provisions of it apply, but if indictment charges, "Conspiracy to Possess and Sell Marijuana," a violation of provisions of the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., is properly charged and the maximum punishment provisions of it apply. *Jones v. State*, 135 Ga. App. 893, 219 S.E.2d 585 (1975).

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Drugs and Controlled Substances, §§ 19 et seq., 47, 141 et seq., 173, 189 et seq.

C.J.S. — 28 C.J.S., Drugs and Narcotics, §§ 210 et seq., 263 et seq., 342 et seq.

U.L.A. — Uniform Controlled Substances Act (U.L.A.) § 401.

ALR. — What constitutes "possession" of a narcotic drug proscribed by § 2 of the Uniform Narcotic Drug Act, 91 ALR2d 810.

Construction and effect of "sale" or "sell" in Uniform Narcotic Drug Act, 93 ALR2d 1008.

Admissibility, in prosecution for illegal sale of narcotics, of evidence of other sales, 93 ALR2d 1097.

Homicide: criminal liability for death resulting from unlawfully furnishing intoxicating liquor or drugs to another, 32 ALR3d 589.

Offense of aiding and abetting illegal possession of drugs or narcotics, 47 ALR3d 1239.

Marijuana, psilocybin, peyote, or similar drugs of vegetable origin as narcotics for purposes of drug prosecution, 50 ALR3d 1164.

LSD, STP, MDA, or other chemically synthesized hallucinogenic or psychedelic substances as narcotics for purposes of drug prosecution, 50 ALR3d 1284.

Permitting unlawful use of narcotics in private home as criminal offense, 54 ALR3d 1297.

Conviction of possession of illicit drugs found in automobile of which defendant was not sole occupant, 57 ALR3d 1319.

Validity and construction of statute creating presumption or inference of intent to sell from possession of specified quantity of illegal drugs, 60 ALR3d 1128.

Modern status of the law concerning entrapment to commit narcotics offense — state cases, 62 ALR3d 110.

Sufficiency of prosecution proof that substance defendant is charged with possessing, selling, or otherwise unlawfully dealing in, is marijuana, 75 ALR3d 717.

What constitutes such discriminatory prosecution or enforcement of laws as to provide valid defense in state criminal proceedings, 95 ALR3d 280.

Constitutionality of state legislation imposing criminal penalties for personal possession or use of marijuana, 96 ALR3d 225.

Narcotics conviction as crime of moral turpitude justifying disbarment or other disciplinary action against attorney, 99 ALR3d 288.

Criminal responsibility for physical measures undertaken in connection with treatment of mentally disordered patient, 99 ALR3d 854.

Admissibility, in criminal prosecution, of expert opinion allegedly stating whether drugs were possessed with intent to distribute — state cases, 83 ALR4th 629.

Minimum quantity of drug required to support claim that defendant is guilty of criminal “possession” of drug under state law, 4 ALR5th 1.

State law criminal liability of licensed physician for prescribing or dispensing drug or similar controlled substance, 13 ALR5th 1.

Criminality of act of directing to, or recommending, source from which illicit drugs may be purchased, 34 ALR5th 125.

Propriety of lesser-included-offense charge in state prosecution of narcotics defendant — Marijuana cases, 1 ALR6th 549.

Propriety of lesser-included-offense charge in state prosecution of narcotics defendant — Cocaine cases, 2 ALR6th 551.

Drug abuse: what constitutes illegal constructive possession under 21 USCS § 841(a)(1), prohibiting possession of a controlled substance with intent to manufacture, distribute, or dispense the same, 87 ALR Fed. 309.

Admissibility of expert evidence concerning meaning of narcotics code language in federal prosecution for narcotics dealing — modern cases, 104 ALR Fed. 230.

16-13-30.1. Unlawful manufacture, delivery, distribution, possession, or sale of noncontrolled substances.

(a)(1) It is unlawful for any person knowingly to manufacture, deliver, distribute, dispense, possess with the intent to distribute, or sell a noncontrolled substance upon either:

(A) The express or implied representation that the substance is a narcotic or nonnarcotic controlled substance;

(B) The express or implied representation that the substance is of such nature or appearance that the recipient of said delivery will be able to distribute said substance as a controlled substance; or

(C) The express or implied representation that the substance has essentially the same pharmacological action or effect as a controlled substance.

(2) The definitions of the terms “deliver,” “delivery,” “distribute,” “dispense,” and “manufacture” provided in Code Section 16-13-21 shall not be applicable to this Code section; but such terms as used in this Code section shall have the meanings ascribed to them in the ordinary course of business.

(b) An implied representation may be shown by proof of any two of the following:

(1) The manufacture, delivery, distribution, dispensing, or sale included an exchange or a demand for money or other valuable property as consideration for delivery of the substance and the amount of such consideration was substantially in excess of the reasonable value of the noncontrolled substance;

(2) The physical appearance of the finished product containing the substance is substantially identical to a specific controlled substance;

(3) The finished product bears an imprint, identifying mark, number, or device which is substantially identical to the trademark, identifying mark, imprint, number, or device of a manufacturer licensed by the Food and Drug Administration of the United States Department of Health and Human Services.

(c) In any prosecution for unlawful manufacture, delivery, distribution, possession with intent to distribute, dispensing, or sale of a noncontrolled substance, it is no defense that the accused believed the noncontrolled substance to be actually a controlled substance.

(d) The provisions of this Code section shall not prohibit a duly licensed business establishment, acting in the usual course of business, from selling or for a practitioner, acting in the usual course of his professional practice, from dispensing a drug preparation manufactured by a manufacturer licensed by the Food and Drug Administration of the United States Department of Health and Human Services for over-the-counter sale which does not bear a label stating “Federal law prohibits dispensing without a prescription” or similar language meaning that the drug preparation requires a prescription.

(e) The unlawful manufacture, delivery, distribution, dispensing, possession with the intention to distribute, or sale of a noncontrolled substance in violation of this Code section is a felony and, upon conviction thereof, such person shall be punished by imprisonment for not less than one year nor more than ten years or by a fine not to exceed \$25,000.00, or both.

(f) All property which would be subject to forfeiture under the provisions of subsection (d) of Code Section 16-13-49 for a violation of this article which is used, or intended for use, to facilitate, or is derived from, a violation of this Code section and any noncontrolled substance

which is manufactured, distributed, dispensed, possessed with the intent to distribute, or sold in violation of this Code section are declared to be contraband and there shall be no property interest therein. Any property or noncontrolled substance which is subject to the provisions of this subsection shall be forfeited in accordance with the procedures of Code Section 16-13-49. (Code 1981, § 16-13-30.1, enacted by Ga. L. 1982, p. 2370, § 3; Ga. L. 1991, p. 886, § 2.)

Editor's notes. — Ga. L. 1991, p. 886, § 4, not codified by the General Assembly, provides: “(a) The repeal, or repeal and reenactment, of the provisions of Code Section 16-13-49 by this Act shall not abate any cause of action which arose at any previous time under the provisions of said Code section prior to the effective date of this Act. Furthermore, no action for forfeiture shall be abated as a result of the provisions of this Act, and any and every such action or cause of action shall continue, subject only to the applicable statute of limitations.

“(b) No property shall be subject to forfeiture pursuant to this Act where the act or omission which makes such property subject to forfeiture occurred prior to the effective date of this Act unless such property was subject to forfeiture under the laws of this state at the time such act or omission occurred.”

Law reviews. — For survey article on criminal law and procedure for the period from June 1, 2002 through May 31, 2003, see 55 Mercer L. Rev. 117 (2003).

JUDICIAL DECISIONS

Penalty provision held constitutional. — O.C.G.A. § 16-13-30.1, which subjects a defendant to a greater penalty for the sale of a non-controlled substance than for the sale of some controlled substances, does not violate due process. *Thompson v. State*, 254 Ga. 393, 330 S.E.2d 348 (1985).

Applicability. — Defendant was erroneously convicted of felony selling a non-controlled substance under O.C.G.A. § 16-13-30.1(a)(1)(A) where the subject conduct also violated O.C.G.A. § 16-13-30.2, which makes it a misdemeanor to possess or distribute an “imitation controlled substance”; the state improperly prosecuted defendant for violating the statute with the greater penalty rather than the one with the lesser penalty. *Brown v. State*, 276 Ga. 606, 581 S.E.2d 35 (2003).

O.C.G.A. § 16-13-30.2 is not a lesser included offense. — O.C.G.A. § 16-13-30.2 cannot be considered a lesser included crime of O.C.G.A. § 16-13-30.1 under the required evidence test because the plain language of § 16-13-30.2 requires proof of a fact not required for a conviction under § 16-13-30.1. *State v.*

Burgess, 263 Ga. 143, 429 S.E.2d 252 (1993).

Not included offense of sale of controlled substance. — Offense of unlawfully selling a noncontrolled substance while representing the substance to be a controlled substance (O.C.G.A. § 16-13-30.1) is not included in the offense of conspiracy to sell or distribute cocaine (O.C.G.A. § 16-13-30). *Smith v. State*, 202 Ga. App. 664, 415 S.E.2d 481 (1992).

Jurors may use experience to determine whether drug was represented. — Jury properly concluded, based on their common sense and the ordinary test of human experiences, that \$20 is “substantially in excess of” the “reasonable value” of an ordinary pebble such as one might pick up off the ground and that the appearance of the noncontrolled substance was so “substantially identical” to that of rock cocaine that an undercover agent whose assignment was to purchase actual cocaine bought it. *Billups v. State*, 206 Ga. App. 91, 424 S.E.2d 355 (1992).

Rule of lenity did not apply to a defendant’s conviction of felony possession with intent to distribute a noncontrolled

substance, O.C.G.A. § 16-13-30.1, because the evidence did not show that the substance at issue was an “imitation controlled substance” for purposes of misdemeanor unlawful manufacture, distribution, or possession with intent to distribute of imitation controlled substances, O.C.G.A. § 16-13-30.2; although the noncontrolled substance at issue was in common packaging for narcotics, the evidence did not show that it appeared as a “dosage unit” based on color, shape, size, or markings or was specifically designed or manufactured to resemble a controlled substance. Therefore, the evidence failed to establish that the defendant’s conduct fell within § 16-13-30.2(a). *Diaz v. State*, 296 Ga. App. 589, 676 S.E.2d 252 (2009).

Rule of lenity did not apply to conviction for imitation controlled substances. — Trial court did not err by refusing to apply the rule of lenity with regard to a defendant’s conviction for selling a counterfeit substance because the evidence revealed that the substance would not fall under either definition of “imitation controlled substance” set forth in O.C.G.A. § 16-13-21(12.1)(A) as the parties stipulated only that the substance recovered was not a controlled substance and there was no evidence presented that it was specifically designed or manufactured to resemble the physical appearance of a controlled substance. As a result, the rule of lenity did not apply, and the trial

court properly sentenced the defendant for a felony. *Chandler v. State*, 294 Ga. App. 27, 668 S.E.2d 510 (2008).

Evidence sufficient to support conviction. — Evidence was sufficient to support a defendant’s convictions under O.C.G.A. § 16-13-30.1 for possessing with intent to distribute a substance represented to be cocaine and possessing with intent to distribute a substance represented to be methamphetamine because, although the defendant argued that the defendant was merely a backseat passenger in a vehicle involved in the underlying transaction who was not shown to be in either actual or constructive possession of the substance at issue, evidence established that the defendant negotiated to sell to an agent a substance expressly represented to be cocaine and a substance expressly represented to be methamphetamine; this material was in the car with the defendant, who handed the material to a third person who was to deliver the substance to the agent, and, the claim that the defendant acted innocently was refuted by the third person’s testimony that the third person and the defendant knew what was going on and that the third person called the defendant to ask about drugs in connection with this transaction. Any rational trier of fact could have concluded beyond a reasonable doubt that the defendant was a party to the crimes. *Diaz v. State*, 296 Ga. App. 589, 676 S.E.2d 252 (2009).

RESEARCH REFERENCES

ALR. — Admissibility, in criminal prosecution, of expert opinion allegedly stating whether drugs were possessed with

intent to distribute — state cases, 83 ALR4th 629.

16-13-30.2. Unlawful manufacture, distribution, or possession with intent to distribute of imitation controlled substances.

(a) Any person who knowingly manufactures, distributes, or possesses with intent to distribute an imitation controlled substance as defined in paragraph (12.1) of Code Section 16-13-21 is guilty of a misdemeanor of a high and aggravated nature.

(b) The provisions of this Code section are cumulative and shall not be construed as restricting any remedy, provisional or otherwise, provided by law for the benefit of any party.

(c) No civil or criminal liability shall be imposed by virtue of this Code section on any person registered under this article who manufactures, distributes, or possesses an imitation controlled substance for use by a practitioner, as defined in paragraph (23) of Code Section 16-13-21, in the course of lawful professional practice or research.

(d) All materials which are manufactured, distributed, or possessed in violation of this Code section are declared to be contraband and shall be forfeited according to the procedure described in Code Section 16-13-49. (Code 1981, § 16-13-30.2, enacted by Ga. L. 1988, p. 1065, § 2.)

Law reviews. — For note, “Can’t Do the Time, Don’t Do the Crime?: Dixon v. State, Statutory Construction, and the

Harsh Realities of Mandatory Minimum Sentencing in Georgia,” see 22 Ga. St. U.L. Rev. 519 (2005).

JUDICIAL DECISIONS

Applicability. — Defendant was erroneously convicted of felony selling a non-controlled substance under O.C.G.A. § 16-13-30.1(a)(1)(A) where the subject conduct also violated O.C.G.A. § 16-13-30.2, which makes it a misdemeanor to possess or distribute an “imitation controlled substance”; the state improperly prosecuted defendant for violating the statute with the greater penalty rather than the one with the lesser penalty. *Brown v. State*, 276 Ga. 606, 581 S.E.2d 35 (2003).

This section not lesser included offense of Code Section 16-13-30.1. — O.C.G.A. § 16-13-30.2 cannot be considered a lesser included crime of O.C.G.A. § 16-13-30.1 under the required evidence test because the plain language of O.C.G.A. § 16-13-30.2 requires proof of a fact not required for a conviction under O.C.G.A. § 16-13-30.1. *State v. Burgess*, 263 Ga. 143, 429 S.E.2d 252 (1993).

Conduct of selling is subsumed in the expressly prohibited activity of distributing and therefore constitutes a violation of O.C.G.A. § 16-13-30.2. *Dorsey v. State*, 212 Ga. App. 479, 441 S.E.2d 891 (1994).

Undercover deputies’ possession of wax pieces of fake cocaine to identify and arrest drug buyers did not violate

prohibition against possessing imitation controlled substance with intent to distribute. *Guzman v. State*, 206 Ga. App. 170, 424 S.E.2d 849 (1992).

Evidence insufficient for conviction. — When a federal chemist testified that, although the chemist thought the green leafy material was marijuana, the chemist did not test the substance, so the chemist could not testify beyond a reasonable doubt that the substance was marijuana, and since no scientifically conclusive evidence was presented at all, a conviction for possession of marijuana with intent to distribute could not stand. *Adkinson v. State*, 236 Ga. App. 270, 511 S.E.2d 527 (1999).

Rule of lenity did not apply. — Rule of lenity did not apply to a defendant’s conviction of felony possession with intent to distribute a noncontrolled substance, O.C.G.A. § 16-13-30.1, because the evidence did not show that the substance at issue was an “imitation controlled substance” for purposes of misdemeanor unlawful manufacture, distribution, or possession with intent to distribute an imitation of controlled substances, O.C.G.A. § 16-13-30.2; although the noncontrolled substance at issue was in common packaging for narcotics, the evi-

dence did not show that the substance appeared as a “dosage unit” based on color, shape, size, or markings or was specifically designed or manufactured to resemble a controlled substance. Therefore, the evidence failed to establish that the defendant’s conduct fell within § 16-13-30.2(a). *Diaz v. State*, 296 Ga. App. 589, 676 S.E.2d 252 (2009).

Rule of lenity did not apply to conviction for imitation controlled substances. — Trial court did not err by refusing to apply the rule of lenity with regard to a defendant’s conviction for selling a counterfeit substance because the

evidence revealed that the substance would not fall under either definition of “imitation controlled substance” set forth in O.C.G.A. § 16-13-21(12.1)(A) as the parties stipulated only that the substance recovered was not a controlled substance and there was no evidence presented that the substance was specifically designed or manufactured to resemble the physical appearance of a controlled substance. As a result, the rule of lenity did not apply, and the trial court properly sentenced the defendant for a felony. *Chandler v. State*, 294 Ga. App. 27, 668 S.E.2d 510 (2008).

RESEARCH REFERENCES

ALR. — Admissibility, in criminal prosecution, of expert opinion allegedly stating whether drugs were possessed with intent to distribute — state cases, 83 ALR4th 629.

Validity, construction, and effect of state statute regulating sale of counterfeit or imitation controlled substances, 84 ALR4th 936.

16-13-30.3. Possession of substances containing ephedrine, pseudoephedrine, and phenylpropanolamine; restrictions on sales of products containing pseudoephedrine.

(a) As used in this Code section, the term:

(1) “Ephedrine,” “pseudoephedrine,” or “phenylpropanolamine” means any drug product containing ephedrine, pseudoephedrine, or phenylpropanolamine, or any of their salts, isomers, or salts of isomers, alone or in a mixture.

(2) “Personal use” means the sale in a single transaction to an individual customer for a legitimate medical use of a product containing ephedrine, pseudoephedrine, or phenylpropanolamine in quantities at or below that specified in subsection (b) of this Code section, and includes the sale of those products to employers to be dispensed to employees from first-aid kits or medicine chests.

(3) “Retail distributor” means a grocery store, general merchandise store, drugstore, convenience store, or other related entity, the activities of which involve the distribution of ephedrine, pseudoephedrine, or phenylpropanolamine products.

(b)(1) It is unlawful for any person, other than a person or entity described in paragraph (28), (29), or (33) of Code Section 26-4-5 or a retail distributor, to knowingly possess any product that contains ephedrine, pseudoephedrine, or phenylpropanolamine in an amount

which exceeds 300 pills, tablets, gelcaps, capsules, or other individual units or more than 9 grams of ephedrine, pseudoephedrine, or phenylpropanolamine, their salts, isomers, or salts of isomers, or a combination of any of these substances, whichever is smaller.

(2) It shall be unlawful for any person to possess any amount of a substance set forth in this Code section with the intent to manufacture amphetamine or methamphetamine.

(3) Any person who violates the provisions of this Code section shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one year nor more than ten years.

(b.1)(1) Products whose sole active ingredient is pseudoephedrine may be offered for retail sale only if sold in blister packaging. Such products may not be offered for retail sale by self-service but only from behind a counter or other barrier so that such products are not directly accessible by the public but only by a retail store employee or agent.

(2) No person shall deliver in any single over the counter sale more than three packages of any product containing pseudoephedrine as the sole active ingredient or in combination with other active ingredients or any number of packages that contain a combined total of more than nine grams of pseudoephedrine or its base, salts, optical isomers, or salts of its optical isomers.

(3) It shall be unlawful for a retail distributor to purchase any product containing pseudoephedrine from any person or entity other than a manufacturer or a wholesale distributor licensed by the State Board of Pharmacy.

(4) This subsection shall not apply to:

(A) Pediatric products labeled pursuant to federal regulation as primarily intended for administration to children under 12 years of age according to label instructions; and

(B) Products that the State Board of Pharmacy, upon application of a manufacturer, exempts because the product is formulated in such a way as to effectively prevent the conversion of the active ingredient into methamphetamine or its salts or precursors.

(5) This subsection shall preempt all local ordinances or regulations governing the retail sale of over the counter products containing pseudoephedrine by a retail business except such local ordinances or regulations that existed on or before December 31, 2004. Effective January 1, 2006, this subsection shall preempt all local ordinances.

(6)(A) Except as otherwise provided herein, it shall be unlawful for any person knowingly to violate any prohibition contained in paragraph (1), (2), or (3) of this subsection.

(B) Any person convicted of a violation of paragraph (1) or (2) of this subsection shall be guilty of a misdemeanor which, upon the first conviction, shall be punished by a fine of not more than \$500.00 and, upon the second or subsequent conviction, shall be punished by not more than six months' imprisonment or a fine of not more than \$1,000.00, or both.

(C) Any person convicted of a violation of paragraph (3) of this subsection shall, upon the first conviction, be guilty of a misdemeanor and, upon the second or subsequent conviction, be guilty of a misdemeanor of a high and aggravated nature.

(D) It shall be a defense to a prosecution of a retail business or owner or operator thereof for violation of paragraph (1) or (2) of this subsection that, at the time of the alleged violation, all of the employees of the retail business had completed training under Georgia Meth Watch, the retail business was in compliance with Georgia Meth Watch, and the defendant did not knowingly, willfully, or intentionally violate paragraph (1) or (2) of this subsection. For purposes of this subsection only, the term "Georgia Meth Watch" shall mean that program entitled "Georgia Meth Watch" or similar program which has been promulgated, approved, and distributed by the Georgia Council on Substance Abuse.

(7) Except as otherwise provided in this subsection, the State Board of Pharmacy may adopt reasonable rules and regulations to effectuate the provisions of this subsection. The board is further authorized to charge reasonable fees to defray expenses incurred in maintaining any records or forms necessitated by this subsection or otherwise administering any other provisions of this subsection.

(c) This Code section shall not apply to:

(1) Pediatric products primarily intended for administration to children under 12 years of age, according to label instructions, either:

(A) In solid dosage form whose recommended dosage, according to label instructions, does not exceed 15 milligrams of ephedrine, pseudoephedrine, or phenylpropanolamine per individual dosage unit; or

(B) In liquid form whose recommended dosage, according to label instructions, does not exceed 15 milligrams of ephedrine, pseudoephedrine, or phenylpropanolamine per five milliliters of liquid product;

(2) Pediatric liquid products primarily intended for administration to children under two years of age for which the recommended dosage does not exceed two milliliters and the total package content does not exceed one fluid ounce; or

(3) Products that the State Board of Pharmacy, upon application of a manufacturer, exempts by rule from this Code section because the product has been formulated in such a way as to prevent effectively the conversion of the active ingredient into methamphetamine or its salts or precursors.

(d) Except as authorized by this article, it is unlawful for any person to possess, have under his or her control, manufacture, deliver, distribute, dispense, administer, purchase, sell, or possess with intent to distribute any substance containing any amounts of ephedrine, pseudoephedrine, phenylpropanolamine, or any of their salts, optical isomers, or salts of optical isomers which have been altered from their original condition so as to be powdered, liquefied, or crushed. This subsection shall not apply to any of the substances identified within this subsection which are possessed or altered for a legitimate medical purpose. Any person who violates this subsection shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one year nor more than ten years. (Code 1981, § 16-13-30.3, enacted by Ga. L. 2003, p. 177, § 3; Ga. L. 2005, p. 194, § 1/HB 216; Ga. L. 2006, p. 72, § 16/SB 465; Ga. L. 2007, p. 47, § 16/SB 103.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2011, “Georgia” was deleted preceding “State Board of Pharmacy” in paragraphs (b.1)(3), (b.1)(7), and (c)(3), and in subparagraph (b.1)(4)(B).

Administrative rules and regulations. — Listed chemical wholesale distributor, Official Compilation of the Rules and Regulations of the State of Georgia, Georgia State Board of Pharmacy, Ch. 480-7A.

JUDICIAL DECISIONS

Constitutionality. — O.C.G.A. § 16-13-30.3(b)(1) was constitutional as it created classifications between those possessing 300 or less individual units of the substances listed, and those possessing more than 300 units; the classifications had a rational basis in combating the illicit drug trade as the Georgia legislature determined that possession of 300 or less individual units served a legitimate health concern, while possession of more than 300 individual units did not. *Rocheft v. State*, 279 Ga. 738, 620 S.E.2d 803 (2005).

O.C.G.A. § 16-13-30.3(b)(1) was not un-

constitutionally vague as “ephedrine,” “pseudoephedrine,” and “phenylpropanolamine” were so similar to one another that each was considered a functional equivalent of the others. *Rocheft v. State*, 279 Ga. 738, 620 S.E.2d 803 (2005).

Evidence sufficient for conviction. — Evidence supported defendant’s conviction for possession of more than 300 tablets of ephedrine as: (1) the equal access rule did not apply as defendant made inculpatory admissions that authorized a finding that defendant possessed the substances; (2) the random testing of two of the 2,329 tablets supported the conviction

as an expert examined the remainder of the tablets, stated that they had the same logo and appearance, and opined that all of the tablets contained pseudoephedrine; and (3) there was not a fatal variance, even though the accusation charged defendant with possession of more than 300 tablets of ephedrine, but the proof showed that the tablets contained pseudoephedrine, as for purposes of O.C.G.A. § 16-13-30.3, “ephedrine” and “pseudoephedrine” were synonymous. *Rocheft v. State*, 279 Ga. 738, 620 S.E.2d 803 (2005).

Convictions of manufacture, distribution, and possession of methamphetamine with the intent to distribute under O.C.G.A. § 16-13-30(b), possession of ephedrine/pseudoephedrine under O.C.G.A. § 16-13-30.3(b)(1), and possession of a firearm during the commission of a felony under O.C.G.A. § 16-11-106(b)(4) were supported by the evidence. A panel van belonging to the defendant had been

modified as a methamphetamine lab, was located on the defendant’s property, and was powered by an electrical cord running from the defendant’s trailer; everything necessary to support the production of methamphetamine was present in the vicinity of the vehicle; the defendant’s name and that of the defendant’s spouse had been scrawled on an interior panel of the vehicle; the defendant offered to provide any methamphetamine that a house guest wanted; uncured methamphetamine and enough ephedrine was present at the scene to make 30 to 33 grams of methamphetamine; and the defendant admitted to giving methamphetamine to others and to owning the sawed-off shotgun recovered from the panel van. *Boone v. State*, 293 Ga. App. 654, 667 S.E.2d 880 (2008).

Cited in Smith v. State, 289 Ga. App. 236, 656 S.E.2d 574 (2008).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required for violators. — O.C.G.A. § 16-13-30.3 is an offense for which those charged with a vio-

lation are to be fingerprinted. 2006 Op. Att’y Gen. No. 2006-2.

16-13-30.4. Licenses for sale, transfer, or purchase for resale of products containing pseudoephedrine; reporting and record-keeping requirements; grounds for denial, suspension, or revocation of licenses; rules and regulations; exceptions; forfeiture; violations.

(a) As used in this Code section and unless otherwise specified, the term “board” or “board of pharmacy” shall mean the State Board of Pharmacy.

(b)(1) A wholesale distributor who sells, transfers, purchases for resale, or otherwise furnishes any product containing pseudoephedrine must first obtain a license from the board of pharmacy; provided, however, that a wholesale distributor that has a valid license as a wholesale distributor under Code Section 26-4-113 shall not be required to obtain an additional license under this Code section.

(2) Wholesale distributors licensed under Code Section 26-4-113 shall be subject to the provisions of this Code section in the same manner as wholesale distributors licensed under this Code section.

(3) Every wholesale distributor licensed as provided in this Code section shall:

(A) Submit reports, upon verbal or written request from the Georgia Drugs and Narcotics Agency, the Georgia Bureau of Investigation, or the sheriff of a county or the police chief of a municipality located in this state, to account for all transactions with persons or firms located within this state; such reportable transactions shall include all sales, distribution, or transactions dealing with products containing pseudoephedrine; and

(B) Within seven days, notify the Georgia Drugs and Narcotics Agency of any purchases of products containing pseudoephedrine from the wholesale distributor which the wholesaler judges to be excessive.

(4) Whenever any firm or person located in this state receives, purchases, or otherwise gains access to products containing pseudoephedrine from any wholesale distributor, whether located in or outside this state, such firm or person shall maintain a copy of such wholesale distributor's license issued by the State Board of Pharmacy. Such firm or person shall maintain copies of all invoices, receipts, and other records regarding such products containing pseudoephedrine for a minimum of three years from the date of receipt, purchase, or access. Failure to maintain records to verify the presence of any and all products containing pseudoephedrine being held by a firm or person shall subject such products containing pseudoephedrine to being embargoed or seized by proper law enforcement authorities until such time as proof can be shown that such products containing pseudoephedrine were obtained from a Georgia licensed wholesale distributor.

(5) Agents of the Georgia Drugs and Narcotics Agency, agents of the Georgia Bureau of Investigation, and the sheriff of a county or the police chief of a county or municipality in this state in which a firm or person that receives, purchases, or otherwise gains access to products containing pseudoephedrine is located may request to review the receiving records for such products. Failure to provide such records within five business days following such request to account for the presence of such products shall result in the embargo or seizure of such products.

(c) A license or permit obtained pursuant to this Code section shall be denied, suspended, or revoked by the board of pharmacy upon finding that the licensee or permit holder has:

(1) Furnished false or fraudulent material information in any application filed under this Code section;

(2) Been convicted of a crime under any state or federal law relating to any controlled substance;

(3) Had his or her federal registration suspended or revoked to manufacture, distribute, or dispense controlled substances;

(4) Violated the provisions of Chapter 4 of Title 26; or

(5) Failed to maintain effective controls against the diversion of products containing pseudoephedrine to unauthorized persons or entities.

(d) The board of pharmacy may adopt reasonable rules and regulations to effectuate the provisions of this Code section. The board is further authorized to charge reasonable fees to defray expenses incurred in issuing any licenses or permits, maintaining any records or forms required by this Code section, and the administration of the provisions of this Code section.

(e) Notwithstanding any other provision of this Code section to the contrary, no person shall be required to obtain a license or permit for the sale, receipt, transfer, or possession of a product containing pseudoephedrine when:

(1) Such lawful distribution takes place in the usual course of business between agents or employees of a single regulated person or entity; or

(2) A product containing pseudoephedrine is delivered to or by a common or contract carrier for carriage in the lawful and usual course of the business of the common or contract carrier or to or by a warehouseman for storage in the lawful and usual course of the business of the warehouseman.

(f) All products containing pseudoephedrine that have been or that are intended to be sold, transferred, purchased for resale, possessed, or otherwise transferred in violation of a provision of this Code section shall be subject to forfeiture to the state and no property right shall exist in them.

(g)(1) Any person who sells, transfers, receives, or possesses a product containing pseudoephedrine violates this Code section if the person:

(A) Knowingly fails to comply with the reporting requirements of this Code section;

(B) Knowingly makes a false statement in a report or record required by this Code section or the rules adopted thereunder; or

(C) Is required by this Code section to have a license or permit and knowingly or deliberately fails to obtain such a license or permit.

(2) It shall be illegal for a person to possess, sell, transfer, or otherwise furnish a product containing pseudoephedrine if such

person possesses, sells, transfers, or furnishes the substance with the knowledge or intent that the substance will be used in the unlawful manufacture of a controlled substance.

(3)(A) A person who violates paragraph (2) of this subsection shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than 15 years or by a fine not to exceed \$100,000.00, or both.

(B) A person who violates any provision of this Code Section other than paragraph (2) of this subsection shall be guilty of a misdemeanor on the first offense and a misdemeanor of a high and aggravated nature on the second and subsequent offenses. (Code 1981, § 16-13-30.4, enacted by Ga. L. 2005, p. 194, § 2/HB 216; Ga. L. 2007, p. 47, § 16/SB 103.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2011, “Georgia” was deleted preceding “State Board of

Pharmacy” in subsection (a) and in the first sentence of paragraph (b)(4).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required for violators. — O.C.G.A. § 16-13-30.4 is an offense for which those charged with a vio-

lation are to be fingerprinted. 2006 Op. Att’y Gen. No. 2006-2.

16-13-30.5. Possession of substances with intent to use or convey such substances for the manufacture of Schedule I or Schedule II controlled substances.

(a) It shall be illegal for a person to possess, whether acquired through theft or other means, any substance with the intent to:

(1) Use such substance in the manufacture of a Schedule I or Schedule II controlled substance; or

(2) Knowingly convey such substance to another for use in the manufacture of a Schedule I or Schedule II controlled substance.

(b) In determining whether a particular substance is possessed with the intent required to violate subsection (a) of this Code section, the court or other authority making such a determination may, in addition to all other logically relevant factors, consider the following:

(1) Statements by the owner or anyone in control of the substance concerning its use;

(2) Prior convictions, if any, of the owner or of anyone in control of the substance for violation of any state or federal law relating to the sale or manufacture of controlled substances;

(3) Instructions or descriptive materials of any kind accompanying the substance or found in the owner's or controlling person's possession concerning, explaining, or depicting its use;

(4) The manner in which the substance is displayed or offered for sale;

(5) The quantity and location of the substance considered in relation to the existence and scope of legitimate uses for the substance in the community; and

(6) Expert testimony concerning the substance's use.

(c) This Code section shall not apply where possession was by a person authorized by law to dispense, prescribe, manufacture, or possess the substance in question.

(d) A person who violates this Code section shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than 15 years or by a fine not to exceed \$100,000.00, or both. (Code 1981, § 16-13-30.5, enacted by Ga. L. 2005, p. 194, § 3/HB 216; Ga. L. 2006, p. 72, § 16/SB 465.)

16-13-30.6. Prohibition on purchase and sale of marijuana flavored products.

(a) As used in this Code section, the term:

(1) "Marijuana flavored product" means any product, including lollipops, gumdrops, or other candy, which is flavored to taste like marijuana or hemp. The term shall include, but is not limited to, "Chronic Candy," "Kronic Kandy," or "Pot Suckers."

(2) "Minor" means any person under the age of 18 years.

(3) "Person" means any natural person, individual, corporation, unincorporated association, proprietorship, firm, partnership, limited liability company, joint venture, joint stock association, or other entity or business organization of any kind.

(b) The General Assembly finds and determines that:

(1) According to the "2004 Monitoring the Future Study" conducted by the University of Michigan, 16.3 percent of eighth graders, 35.1 percent of tenth graders, and 45.7 percent of twelfth graders reported using marijuana at least once during their lifetimes;

(2) According to a 2002 Substance Abuse and Mental Health Service Administration report, "Initiation of Marijuana Use: Trends, Patterns and Implications," the younger children are when they first use marijuana, the more likely they are to use cocaine and heroin and become drug dependent as adults;

(3) Marijuana abuse is associated with many negative health effects, including frequent respiratory infections, impaired memory and learning, increased heart rate, anxiety, and panic attacks;

(4) Marijuana users have many of the same respiratory problems that are associated with tobacco use;

(5) According to the "2001 National Household Survey on Drug Abuse," marijuana is the nation's most commonly used illicit drug, and more than 83,000,000 Americans aged 12 and older have tried marijuana at least once;

(6) Use of marijuana has been shown to lower test scores among high school students, and workers who smoke marijuana are more likely to have problems on their jobs;

(7) Federal, state, and local governments spend millions of dollars annually on programs educating people about the hazards of drugs, and the marketing of marijuana flavored substances would have an adverse impact upon these programs;

(8) The sale of marijuana flavored products, including lollipops and gum drops, which claim "every lick is like taking a hit" is a marketing ploy that perpetuates an unhealthy culture and should not be permitted in the State of Georgia;

(9) Marijuana flavored products are a threat to minors in the State of Georgia because such products give the false impression that marijuana is fun and safe;

(10) Marijuana flavored products packaged as candy or lollipops falling into the hands of unsuspecting minors may serve as a gateway to future use of marijuana and other drugs; and

(11) Merchants who sell marijuana flavored products are promoting marijuana use and creating new customers for drug dealers in the State of Georgia.

Therefore, the purpose of this Code section is to prohibit the purchase and sale of marijuana flavored products to minors in the State of Georgia.

(c) It shall be unlawful for any person knowingly to sell, deliver, distribute, or provide to a minor or knowingly possess with intent to sell, deliver, distribute, or provide to a minor any marijuana flavored product in the State of Georgia.

(d) It shall be unlawful for any minor falsely to represent to any person that such minor is 18 years of age or older with the intent to purchase or otherwise obtain any marijuana flavored product.

(e) Any person who violates subsection (c) of this Code section shall be guilty of a misdemeanor and shall be subject to a fine of \$500.00 for

each offense. Each sale in violation of this Code section shall constitute a separate offense. (Code 1981, § 16-13-30.6, enacted by Ga. L. 2008, p. 129, § 1/HB 280; Ga. L. 2009, p. 8, § 16/SB 46.)

The 2009 amendment, effective April 14, 2009, part of an Act to revise, modernize, and correct the Code, revised language in the ending undesignated paragraph of subsection (b).

Editor's notes. — Ga. L. 2008, p. 129, § 2, not codified by the General Assembly, provides that this Code section shall apply to offenses committed on or after July 1, 2008.

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required for violators. — Offenses arising under O.C.G.A. § 16-13-30.6(c) are designated as offenses

for which those charged are to be fingerprinted. 2009 Op. Att'y Gen. No. 2009-1.

16-13-31. Trafficking in cocaine, illegal drugs, marijuana, or methamphetamine; penalties.

(a)(1) Any person who knowingly sells, manufactures, delivers, or brings into this state or who is knowingly in possession of 28 grams or more of cocaine or of any mixture with a purity of 10 percent or more of cocaine, as described in Schedule II, in violation of this article commits the felony offense of trafficking in cocaine and, upon conviction thereof, shall be punished as follows:

(A) If the quantity of the cocaine or the mixture involved is 28 grams or more, but less than 200 grams, the person shall be sentenced to a mandatory minimum term of imprisonment of ten years and shall pay a fine of \$200,000.00;

(B) If the quantity of the cocaine or the mixture involved is 200 grams or more, but less than 400 grams, the person shall be sentenced to a mandatory minimum term of imprisonment of 15 years and shall pay a fine of \$300,000.00; and

(C) If the quantity of the cocaine or the mixture involved is 400 grams or more, the person shall be sentenced to a mandatory minimum term of imprisonment of 25 years and shall pay a fine of \$1 million.

(2) Any person who knowingly sells, manufactures, delivers, or brings into this state or who is knowingly in possession of any mixture with a purity of less than 10 percent of cocaine, as described in Schedule II, in violation of this article commits the felony offense of trafficking in cocaine if the total weight of the mixture multiplied by the percentage of cocaine contained in the mixture exceeds any of the quantities of cocaine specified in paragraph (1) of this subsection. Upon conviction thereof, such person shall be punished as provided in paragraph (1) of this subsection depending upon the quantity of

cocaine such person is charged with knowingly selling, manufacturing, delivering, or bringing into this state or knowingly possessing.

(b) Any person who knowingly sells, manufactures, delivers, brings into this state, or has possession of 4 grams or more of any morphine or opium or any salt, isomer, or salt of an isomer thereof, including heroin, as described in Schedules I and II, or 4 grams or more of any mixture containing any such substance in violation of this article commits the felony offense of trafficking in illegal drugs and, upon conviction thereof, shall be punished as follows:

(1) If the quantity of such substances involved is 4 grams or more, but less than 14 grams, the person shall be sentenced to a mandatory minimum term of imprisonment of five years and shall pay a fine of \$50,000.00;

(2) If the quantity of such substances involved is 14 grams or more, but less than 28 grams, the person shall be sentenced to a mandatory minimum term of imprisonment of ten years and shall pay a fine of \$100,000.00; and

(3) If the quantity of such substances involved is 28 grams or more, the person shall be sentenced to a mandatory minimum term of imprisonment of 25 years and shall pay a fine of \$500,000.00.

(c) Any person who knowingly sells, manufactures, grows, delivers, brings into this state, or has possession of a quantity of marijuana exceeding 10 pounds commits the offense of trafficking in marijuana and, upon conviction thereof, shall be punished as follows:

(1) If the quantity of marijuana involved is in excess of 10 pounds, but less than 2,000 pounds, the person shall be sentenced to a mandatory minimum term of imprisonment of five years and shall pay a fine of \$100,000.00;

(2) If the quantity of marijuana involved is 2,000 pounds or more, but less than 10,000 pounds, the person shall be sentenced to a mandatory minimum term of imprisonment of seven years and shall pay a fine of \$250,000.00; and

(3) If the quantity of marijuana involved is 10,000 pounds or more, the person shall be sentenced to a mandatory minimum term of imprisonment of 15 years and shall pay a fine of \$1 million.

(d) Any person who knowingly sells, manufactures, delivers, or brings into this state 200 grams or more of methaqualone or of any mixture containing methaqualone, as described in paragraph (6) of Code Section 16-13-25, in violation of this article commits the felony offense of trafficking in methaqualone and, upon conviction thereof, shall be punished as follows:

(1) If the quantity of the methaqualone or the mixture involved is 200 grams or more, but less than 400 grams, the person shall be sentenced to a mandatory minimum term of imprisonment of five years and shall pay a fine of \$50,000.00; and

(2) If the quantity of the methaqualone or the mixture involved is 400 grams or more, the person shall be sentenced to a mandatory minimum term of imprisonment of 15 years and shall pay a fine of \$250,000.00.

(e) Any person who knowingly sells, delivers, or brings into this state or has possession of 28 grams or more of methamphetamine, amphetamine, or any mixture containing either methamphetamine or amphetamine, as described in Schedule II, in violation of this article commits the felony offense of trafficking in methamphetamine or amphetamine and, upon conviction thereof, shall be punished as follows:

(1) If the quantity of methamphetamine, amphetamine, or a mixture containing either substance involved is 28 grams or more, but less than 200 grams, the person shall be sentenced to a mandatory minimum term of imprisonment of ten years and shall pay a fine of \$200,000.00;

(2) If the quantity of methamphetamine, amphetamine, or a mixture containing either substance involved is 200 grams or more, but less than 400 grams, the person shall be sentenced to a mandatory minimum term of imprisonment of 15 years and shall pay a fine of \$300,000.00; and

(3) If the quantity of methamphetamine, amphetamine, or a mixture containing either substance involved is 400 grams or more, the person shall be sentenced to a mandatory minimum term of imprisonment of 25 years and shall pay a fine of \$1 million.

(f) Any person who knowingly manufactures methamphetamine, amphetamine, or any mixture containing either methamphetamine or amphetamine, as described in Schedule II, in violation of this article commits the felony offense of trafficking methamphetamine or amphetamine and, upon conviction thereof, shall be punished as follows:

(1) If the quantity of methamphetamine, amphetamine, or a mixture containing either substance involved is less than 200 grams, the person shall be sentenced to a mandatory minimum term of imprisonment of ten years and shall pay a fine of \$200,000.00;

(2) If the quantity of methamphetamine, amphetamine, or a mixture containing either substance involved is 200 grams or more, but less than 400 grams, the person shall be sentenced to a mandatory minimum term of imprisonment of 15 years and shall pay a fine of \$300,000.00; and

(3) If the quantity of methamphetamine, amphetamine, or a mixture containing either substance involved is 400 grams or more, the person shall be sentenced to a mandatory minimum term of imprisonment of 25 years and shall pay a fine of \$1 million.

(g)(1) Except as provided in paragraph (2) of this subsection and notwithstanding Code Section 16-13-2, with respect to any person who is found to have violated this Code section, adjudication of guilt or imposition of sentence shall not be suspended, probated, deferred, or withheld prior to serving the mandatory minimum term of imprisonment prescribed by this Code section.

(2) The district attorney may move the sentencing court to impose a reduced or suspended sentence upon any person who is convicted of a violation of this Code section and who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, coconspirators, or principals. Upon good cause shown, the motion may be filed and heard in camera. The judge hearing the motion may impose a reduced or suspended sentence if he finds that the defendant has rendered such substantial assistance.

(h) Any person who violates any provision of this Code section in regard to trafficking in cocaine, illegal drugs, marijuana, or methamphetamine shall be punished by imprisonment for not less than five years nor more than 30 years and by a fine not to exceed \$1 million. (Ga. L. 1980, p. 432, § 1; Ga. L. 1982, p. 3, § 16; Ga. L. 1982, p. 2215, § 1; Ga. L. 1983, p. 620, § 1; Ga. L. 1985, p. 149, § 16; Ga. L. 1985, p. 552, § 1; Ga. L. 1986, p. 10, § 16; Ga. L. 1986, p. 397, § 1; Ga. L. 1988, p. 420, § 2; Ga. L. 1989, p. 1594, § 1; Ga. L. 1992, p. 2106, § 1; Ga. L. 1994, p. 169, § 5.1; Ga. L. 1997, p. 1311, § 5; Ga. L. 2003, p. 177, § 4; Ga. L. 2003, p. 257, § 1.)

Cross references. — Reward for furnishing information leading to arrest and conviction of person charged with selling controlled substance in violation of section, § 45-12-37.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1987, a comma was deleted following “Code section” in subsection (f) (now (h)).

Law reviews. — For survey article on criminal law and procedure, see 34 Mercer L. Rev. 89 (1982). For annual survey of criminal law and procedure, see 41 Mercer L. Rev. 115 (1989). For annual survey on

criminal law and procedure, see 42 Mercer L. Rev. 141 (1990). For article, “Criminal Forfeiture: An Appropriate Solution to the Civil Forfeiture Debate,” see 10 Georgia St. U. L. Rev. 241 (1994). For annual survey of criminal law, see 57 Mercer L. Rev. 113 (2005). For survey article on criminal law, see 59 Mercer L. Rev. 89 (2007).

For note on 1992 amendment of this Code section, see 9 Georgia St. U.L. Rev. 212 (1992). For note on the 2003 amendment to this Code section, see 20 Georgia St. U.L. Rev. 76 (2003).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

POSSESSION
 QUANTITY OF CONTRABAND
 SUFFICIENCY OF EVIDENCE
 SENTENCING

General Consideration

Constitutionality. — See *Paras v. State*, 247 Ga. 75, 274 S.E.2d 451 (1981).

Imposing greater punishment based on the total amount of mixture possessed, and not on the total amount of cocaine, is not an unconstitutional classification scheme. *Lavelle v. State*, 250 Ga. 224, 297 S.E.2d 234 (1982).

Setting a maximum sentence does not conflict with the preamble of the act which enacted this section, which refers to minimum sentences; O.C.G.A. § 16-13-31(f) is logically related to the purposes of the act and is therefore constitutional. *Ellis v. State*, 256 Ga. 751, 353 S.E.2d 19 (1987).

Mandatory fines imposed under O.C.G.A. § 16-13-31 do not violate constitutional standards. *Green v. State*, 239 Ga. App. 617, 521 S.E.2d 441 (1999).

O.C.G.A. § 16-13-31(e) did not violate equal protection of the laws because the statute contained no purity requirement, as was required for cocaine, because the legislature was under no duty to treat all drugs and drug offenders the same, the mere fact that cocaine and methamphetamine were both listed as Schedule II controlled substances did not mean that the legislature had to enact identical statutes pertaining to those substances, and the statute treated all those charged with methamphetamine trafficking equally. *Hardin v. State*, 277 Ga. 242, 587 S.E.2d 634 (2003).

Manufacturing methamphetamine charge in a the complaint did not violate ex post facto protections under U.S. Const. Art. I, Sec. 10 and Ga. Const. 1983, Art. I, Sec. I, Para. X since the defendant was not charged under O.C.G.A. § 16-13-31(f)(1), which was not effective at the time of the defendant's conduct; at the time of the offense, the defendant's alleged conduct was prohibited by former O.C.G.A. § 16-13-31(e). *Gentry v. State*, 281 Ga. App. 315, 635 S.E.2d 782 (2006), cert. denied, 2007 Ga. LEXIS 78 (Ga. 2007).

Abatement of pending prosecutions

by 1985 repeal and reenactment. — Prosecutions for trafficking in cocaine by possessing more than 28 grams of a mixture containing cocaine were abated by the lack of a savings clause in the 1985 repeal and reenactment of O.C.G.A. § 16-13-31. *Blount v. State*, 181 Ga. App. 330, 352 S.E.2d 220 (1986).

While clearly after July 1, 1985, the date this section was repealed and reenacted, the legislature no longer regarded as trafficking in cocaine the possession of an undetermined and perhaps infinitesimal amount of cocaine in a mixture, it is clear the legislature continued to regard selling, manufacturing, delivering or bringing into this state and possessing 342.4 grams of pure cocaine to be trafficking and, moreover, increased the penalty. Therefore, the prosecution of such conduct under the former law did not abate with re-defining the crime and the reenactment of harsher criminal sanctions. Thus, the trial court did not err in sentencing the defendant to 25 years, 15 years in confinement and ten years on probation, with a \$250,000 fine, which was the penalty that attached to defendant's conduct under the law by which defendant was prosecuted. *Barrett v. State*, 183 Ga. App. 729, 360 S.E.2d 400 (1987), overruled on other grounds, *Gonzalez v. Abbott*, 262 Ga. 671, 425 S.E.2d 272 (1993); *Mataluni v. State*, 185 Ga. App. 551, 364 S.E.2d 911 (1988).

When at the time of the indictment and trial O.C.G.A. § 16-13-31(a) provided that any person who was knowingly in actual possession of 28 grams or more of cocaine or of any mixture containing cocaine committed the felony offense of trafficking in cocaine, but effective July 1, 1985, the new statute deleted the mixture language and trafficking in cocaine was no longer defined as being in possession of "any mixture containing cocaine," and the July 1, 1985, effective date occurred prior to the time that the defendant's appeal had reached final disposition in the Court of Appeals, the repeal of the statute abated the prosecution, as the prosecution had

General Consideration (Cont'd)

not reached final disposition in the highest court. *Blackshear v. Wharton*, 258 Ga. 427, 370 S.E.2d 152 (1988).

Repeal date of former subsection

(a). — Repeal date of former O.C.G.A. § 16-13-31(a) occurred on July 1, 1986, the effective date of a 1986 amendment to that subsection (a), and not the date of the amendment's enactment on March 28, 1986, so that there was no gap between March 28 and July 1 in which cocaine trafficking was legal. *Rodriguez v. State*, 184 Ga. App. 819, 363 S.E.2d 23 (1987).

Conviction prior to redefinition of crime. — Redefinition of the crime of trafficking in cocaine prior to the defendant's conviction did not void the conviction when the conviction was authorized under the redefinition of the crime of trafficking in cocaine as well as under the former version of O.C.G.A. § 16-13-31. *Nichols v. State*, 186 Ga. App. 314, 367 S.E.2d 266 (1988).

Offense committed prior to redefinition of crime. — When the defendant challenges the sufficiency of the evidence, contending that the state failed to show that the defendant was in "actual possession" of cocaine as was then required by O.C.G.A. § 16-13-31(a), and the appellate courts of this state have held that a charge such as the one given in the defendant's case constitutes reversible error because there is a substantial likelihood that the instruction could have been interpreted by the jury as authorizing a conviction for trafficking in cocaine on a finding of mere constructive possession, the instruction was substantially in error and harmful as a matter of law, and the court reversed the defendant's conviction for the offense of trafficking in cocaine. *Riley v. State*, 191 Ga. App. 781, 383 S.E.2d 172 (1989).

Invalidity of convictions under repealed statute. — Conviction for conspiracy to traffic in cocaine was void when the indictment alleged a conspiracy to commit the crime of possessing a sufficient amount of substance containing cocaine and the Georgia Supreme Court denied review by certiorari after July 1, 1985, the date of repeal of the former trafficking in cocaine statute; use of the

word "substance" in the indictment was a synonym for "mixture" as used in the statute. *Gonzalez v. Abbott*, 262 Ga. 671, 425 S.E.2d 272 (1993).

Conviction for conspiracy to traffic in cocaine was void where the indictment alleged a conspiracy to commit the crime of possessing a sufficient amount of a substance containing cocaine and alleged that defendant committed the overt act of possessing 945 grams of cocaine at a certain time, and the Georgia Supreme Court denied review by certiorari after July 1, 1985, the date of repeal of the former trafficking in cocaine statute. *Gonzalez v. Abbott*, 262 Ga. 671, 425 S.E.2d 272 (1993).

Jurisdiction. — When a defendant acts as a procuring agent in this state in arranging the sale of controlled substances in another state, defendant thereby commits an offense defined in O.C.G.A. § 16-13-31, and this state has jurisdiction to impose punishment. *Raftis v. State*, 175 Ga. App. 893, 334 S.E.2d 857 (1985).

Distinguishing between trafficking and possession. — Amount of controlled substance was chosen as the basis for distinguishing the crime of trafficking from the somewhat less serious crimes described in O.C.G.A. § 16-13-30. Twenty-eight grams was chosen as the dividing line. *Bassett v. Lemacks*, 258 Ga. 367, 370 S.E.2d 146 (1988).

District court's sentencing enhancement under U.S. Sentencing Guidelines Manual § 2L1.2(b)(1)(A)(i) to alien's illegal re-entry conviction under 8 U.S.C. § 1326(a)(2) and (b)(2) was proper because Georgia's three-tiered drug scheme recognized that someone in possession of 87 grams of methamphetamine planned on distributing and thereby "trafficking" those drugs; therefore, the alien's previous conviction under O.C.G.A. § 16-13-31(e) constituted drug trafficking for purposes of § 2L1.2(b)(1)(A)(i) of the manual. *United States v. Madera-Madera*, 333 F.3d 1228 (11th Cir.), cert. denied, 540 U.S. 1026, 124 S. Ct. 589, 157 L. Ed. 2d 447 (2003).

Construed with O.C.G.A. §§ 16-13-26(1)(D) and 16-13-20. — When the total weight of the substances

seized from defendant was only 24.4 grams of cocaine, the defendant argued that the only Georgia statute that proscribes possession of cocaine is O.C.G.A. § 16-13-31, which prohibits the possession of 28 grams or more of cocaine. However, although that section deals with knowing, actual possession of 28 grams or more of cocaine or any mixture containing cocaine, O.C.G.A. § 16-13-26(1)(D) (prior to 1988 amendment inserting "Cocaine," at the beginning of the paragraph) lists "Coca leaves, any salt, compound, derivative, stereoisomers of cocaine, or preparation of coca leaves, and any salt, compound, derivative, stereoisomers of cocaine, or preparation thereof which is chemically equivalent or identical with any of these substances ...," which includes cocaine. Under O.C.G.A. § 16-13-30, the unlawful possession of any controlled substance, regardless of amount, constitutes an offense. *Dixon v. State*, 180 Ga. App. 222, 348 S.E.2d 742 (1986) (decided prior to 1988 amendment of § 16-13-26).

Joinder of offenses. — Charges of conspiracy to import marijuana and trafficking in marijuana could be joined for trial, over objection, where the charges arose from the same conduct. *Bridges v. State*, 195 Ga. App. 851, 395 S.E.2d 30 (1990).

Error in indictment as to purity of cocaine. — When an indictment incorrectly charged the defendant with possession of a substance composed of a purity of one-tenth of a percent of cocaine, and the defendant moved at trial to dismiss the indictment, the trial court properly refused and constructively amended the indictment before the jury to read "ten percent." By waiting until trial to complain of the form of the indictment, the defendant was too late; motions to quash must be entered before trial, or the motions are waived. *Arena v. State*, 194 Ga. App. 883, 392 S.E.2d 264 (1990).

Absence of the word "purity" from an indictment charging trafficking in cocaine did not render the indictment void as the Georgia Supreme Court itself has omitted the word when describing the crime prohibited by the statute. *Clark v. State*, 266 Ga. App. 334, 596 S.E.2d 783 (2004).

Indictment valid. — Trial court properly denied the defendant's motion to dismiss the indictment accusing the defendant of criminal attempt to traffic in cocaine in violation of O.C.G.A. §§ 16-4-1 and 16-13-31(a)(1); purity did not have to be alleged in an attempt case, particularly since there was no cocaine involved in the instant case, the indictment satisfied O.C.G.A. § 17-7-54(a) by tracking the applicable statutes in a manner that was easily understood and by apprising the defendant of both the crime and the manner in which it was alleged to have been committed, and if the defendant admitted the allegations precisely as set forth in the indictment, the defendant would have been guilty of criminal attempt to traffic in cocaine. *Davis v. State*, 281 Ga. App. 855, 637 S.E.2d 431 (2006), cert. denied, 2007 Ga. LEXIS 151 (Ga. 2007).

Trial court's decision overruling the defendant's special demurrer to an indictment charging the defendant with trafficking in methamphetamine and misdemeanor possession of marijuana in violation of O.C.G.A. §§ 16-13-30(b) and 16-13-31(e) was authorized because the allegations of the indictment were sufficient to be easily understood by the jury, to allow the defendant to prepare the defendant's defense, and to protect the defendant from double jeopardy; the indictment sufficiently set forth the date of the offenses and tracked the material language of the statutes proscribing the charged offenses, and the language set forth in the counts against the codefendants separately designated the drugs upon which those charges were based and made clear that the defendant's drug charges were not based upon the drugs allegedly possessed by those individual codefendants. *Fyfe v. State*, 305 Ga. App. 322, 699 S.E.2d 546 (2010).

Evidence sufficient to defeat motion for acquittal. — Evidence that the 817.7 grams of powdery substance seized contained cocaine, without proof that the actual cocaine in the substance exceeded 400 grams, defeated a motion for acquittal. *Quinn v. State*, 171 Ga. App. 590, 320 S.E.2d 827 (1984).

Assessment of marijuana bales from samples rather than from every

General Consideration (Cont'd)

part. — See *Coop v. State*, 186 Ga. App. 578, 367 S.E.2d 836 (1988).

Probable cause for arrest. — Trial court did not err in denying the defendant's motion to suppress the cocaine found by an officer after a precautionary pat-down as the officer's actions in responding to a suspicious-person complaint and immediately encountering the defendant were reasonable and neither arbitrary nor harassing; hence, the seizure was authorized as incident to a lawful arrest. *Simmons v. State*, 281 Ga. App. 654, 637 S.E.2d 70 (2006), cert. denied, 2007 Ga. LEXIS 77 (Ga. 2007).

In a prosecution for burglary and trafficking methamphetamine, probable cause supported the defendant's warrantless arrest and supported the admission of the seized evidence because: (1) it was reasonable for the arresting officers to act upon an investigating deputy's observations; (2) law enforcement had reasonably trustworthy information to warrant their belief that the defendant had committed or had participated in committing a burglary; and (3) a determination of probable cause to arrest the defendant could rest on the collective knowledge of the police, given the communication between them. *Murphy v. State*, 286 Ga. App. 447, 649 S.E.2d 565 (2007).

Police search of a defendant's bag and person which produced handguns, cocaine, cash, and other drugs was lawful because the search was made pursuant to the police officers' lawful warrantless arrest of the defendant when the defendant arrived at a motel room exactly answering a detailed description provided by a confidential informant, who stated that the defendant would be carrying a shoulder bag containing drugs and a loaded handgun. *Green v. State*, 302 Ga. App. 388, 691 S.E.2d 283 (2010).

Charge as to possession properly refused. — When under the evidence presented, only two verdicts were possible—guilty of trafficking in cocaine or acquittal, it was not error for the trial court to refuse to charge the jury concerning possession of cocaine. *Hernandez v. State*, 182 Ga. App. 797, 357 S.E.2d 131 (1987).

Charge on lesser included offense of possession of marijuana properly refused. — See *Christian v. State*, 181 Ga. App. 569, 353 S.E.2d 65 (1987).

Charge on lesser included offense of possession with intent to distribute. — Because defendant was indicted for possession of more than 28 grams of methamphetamine, a violation of O.C.G.A. § 16-13-31, defendant had sufficient notice that the lesser included offense of possession with intent to distribute, a violation of O.C.G.A. § 16-13-30(b), might be submitted to the jury if the evidence warranted it; consequently, by charging the lesser offense in accordance with O.C.G.A. § 16-1-6, the trial court did not permit the jury to convict defendant in a manner not alleged in the indictment in violation of defendant's due process rights. *Rupnik v. State*, 273 Ga. App. 34, 614 S.E.2d 153 (2005).

Conviction for possessing cocaine was not inconsistent with acquittal of trafficking in cocaine since the cocaine upon which the possession offense was based was seized at a different time and place from the cocaine upon which the trafficking offense was based. *Rogers v. State*, 182 Ga. App. 599, 356 S.E.2d 546 (1987).

Merger of trafficking charge with conspiracy count. — Since the defendant was convicted of trafficking in marijuana, a conviction for conspiracy to traffic in marijuana cannot also stand and the jury should be instructed that a verdict of one or the other is authorized but not both. *Hardin v. State*, 172 Ga. App. 232, 322 S.E.2d 540 (1984).

Offenses of conspiracy to traffic in marijuana and trafficking itself did not merge when conspirators first possessed the marijuana, since the "trafficking" charge involved sale of the marijuana, an act not yet completed. *Meyers v. State*, 174 Ga. App. 161, 329 S.E.2d 293 (1985).

Offense of selling marijuana was not complete upon defendants' leading undercover agents to the site of the marijuana since an agreed-upon weighing, loading, and delivering had not yet occurred; thus, the substantive trafficking offense did not merge with or extinguish the conspiracy-to-traffic offense. *Meyers v.*

State, 174 Ga. App. 161, 329 S.E.2d 293 (1985).

Merger of selling with trafficking.

— Convictions on counts for selling methamphetamine were lesser included offenses of convictions for trafficking in methamphetamine and, therefore, merged into the trafficking convictions. *Nunery v. State*, 229 Ga. App. 246, 493 S.E.2d 610 (1997).

"Intent to distribute" not required.

— There is no requirement in O.C.G.A. § 16-13-31 that the state either allege or prove that defendant had an intent to distribute cocaine. *Moran v. State*, 170 Ga. App. 837, 318 S.E.2d 716 (1984).

Knowledge of possession by other defendant.

— Mere fact that a defendant is traveling with someone who is convicted for possessing cocaine does not establish that the defendant is a party to the crime of possession even if the defendant may have known that the defendant's companion is carrying drugs. *Haxho v. State*, 186 Ga. App. 393, 367 S.E.2d 282 (1988).

General demurrer. — Counsel was not ineffective for failing to file a general demurrer to an indictment; even if a general demurrer had been filed, there would have been no error in denying it as the defendant could not have admitted all the facts and still have been innocent. *Harris v. State*, 258 Ga. App. 669, 574 S.E.2d 871 (2002).

Form of cocaine. — Offense "trafficking in cocaine" is committed whether cocaine is delivered in a pure form or whether the cocaine is present in a mixture containing other substances, as long as the quantity of the mass containing cocaine is more than 28 grams. *Belcher v. State*, 161 Ga. App. 442, 288 S.E.2d 299 (1982); *Godett v. State*, 205 Ga. App. 545, 423 S.E.2d 34 (1992).

Since at the time of the offense, O.C.G.A. § 16-13-31(a) defined two methods of committing the crime of trafficking in cocaine, one dealing with pure cocaine and the other with mixtures containing cocaine, by amending the trafficking statute in 1985 to define the crime as "actual possession of 28 grams or more of cocaine," the legislature demonstrated an intent to repeal that portion of the trafficking statute which defined the crime as

"actual possession of 28 grams or more ..of any mixture containing cocaine ...," and a defendant convicted thereafter of trafficking in a mixture is being held under an illegal sentence and must be discharged in a habeas corpus proceeding. *Bassett v. Lemacks*, 258 Ga. 367, 370 S.E.2d 146 (1988).

Trial court's jury charge in the attempted trafficking in cocaine case under O.C.G.A. §§ 16-4-1 and 16-13-31 was not improper despite the trial court's failure to instruct the jury on purity, as purity was not an essential element of criminal attempt to traffic in cocaine. *Davis v. State*, 281 Ga. App. 855, 637 S.E.2d 431 (2006), cert. denied, 2007 Ga. LEXIS 151 (Ga. 2007).

Although the lab reports were less than explicit on the element of purity of the cocaine, the reports could have reasonably been interpreted to authorize the trial judge to find beyond a reasonable doubt that the substances described therein were of a purity of 10 percent or more of cocaine. *Stroud v. State*, 286 Ga. App. 124, 648 S.E.2d 476 (2007).

Cocaine hydrochloride. — Indictment charging the defendant with trafficking in cocaine is not at fatal variance with proof at trial that a powder found in the defendant's suitcase was cocaine hydrochloride, a salt of cocaine, because under O.C.G.A. § 16-13-26 the definition of cocaine includes any salt of cocaine. *Britt v. State*, 186 Ga. App. 418, 367 S.E.2d 298 (1988).

Ownership of the contraband is not an element of the offense of trafficking in cocaine. *Reeves v. State*, 192 Ga. App. 12, 383 S.E.2d 613 (1989).

Circumstantial evidence of possession. — There is no requirement that the proof of actual possession be by direct and not circumstantial evidence. *Heath v. State*, 186 Ga. App. 655, 368 S.E.2d 346 (1988).

Warrantless search of parolee. — Trial court erred in granting the defendant's motion to suppress evidence seized after an automobile search given that law enforcement had reliable information that the defendant was transporting drugs, specifically, cocaine, as: (1) the defendant was on parole, and that as a condition

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thereof, had specifically consented to a warrantless search; (2) the information received from the informant about the defendant's actions was reliable; and (3) no evidence was presented that the officers acted in bad faith or to harass the defendant. *State v. Cauley*, 282 Ga. App. 191, 638 S.E.2d 351 (2006), cert. denied, 2007 Ga. LEXIS 148 (Ga. 2007).

Totality of circumstances suggests participation. — Totality of the circumstances supported the finding that the defendants not only had knowledge of the drug transport but directly and actively participated in the transport, since the defendants were nervous at the initial traffic stop, and had vague accounts of visiting a sick relative. *Eliopoulos v. State*, 203 Ga. App. 262, 416 S.E.2d 745, cert. denied, 203 Ga. App. 906, 416 S.E.2d 745 (1992).

Testimony by agent. — Court properly allowed an agent to testify on direct examination as to the agent's conversations with a coconspirator as part of the *res gestae*. What the coconspirator said, as related by the agent, did not refer to the defendants or directly implicate the defendants but concerned instead the quantity of cocaine being negotiated for sale. *Lawrence v. State*, 187 Ga. App. 211, 369 S.E.2d 531 (1988).

No reversible error. — Inclusion of language of the applicable Code section which was not pertinent to the indictment was not reversible error because illegal possession is included in the crime illegal sale. *Sullivan v. State*, 204 Ga. App. 274, 418 S.E.2d 807 (1992).

Court did not err in jury charge by quoting statute in the statute's entirety, and the fact that the trafficking charge also stated that possession was required did not by itself result in charging an offense with which the defendant was not charged since the jury was informed there were two separate counts and the indictment gave the defendant notice that the defendant would have to defend against both counts. *Cauthen v. State*, 177 Ga. App. 565, 340 S.E.2d 199 (1986), overruled on other grounds, *Green v. State*, 260 Ga. 625, 398 S.E.2d 360 (1990).

Jury instructions. — When the defendant was charged with trafficking in cocaine and possession of marijuana and on the day of the trial filed a request that the "jury be charged with the substance of § 16-13-30 and § 16-13-31," by seeking an instruction on two entire Code sections the request necessarily included such matter not adjusted to the issues of the case, and for this reason it was not error to fail to give such instructions. *Partridge v. State*, 187 Ga. App. 325, 370 S.E.2d 173, cert. denied, 187 Ga. App. 908, 370 S.E.2d 173 (1988).

When in the court's charge to the jury, the court read the indictment, pointing out that in Count 1 the defendants were charged with trafficking by knowing possession of the cocaine, and further instructed that the jury should reach a decision on the trafficking offense based on the charges as made in Count 1 of the indictment, the instructions were sufficient to prevent any likelihood that the jury would mistakenly convict defendants on evidence supporting a form of trafficking in cocaine not charged in the indictment. *Ancrum v. State*, 197 Ga. App. 819, 399 S.E.2d 574 (1990).

Despite the defendant's allegation that there was a reasonable probability that the defendant was convicted of committing the offense of trafficking in cocaine in a manner other than that alleged in the indictment, when the trial court immediately charged the jury that to establish the defendant's guilt for trafficking, the state had to prove beyond a reasonable doubt that the defendant knowingly had in the defendant's possession more than 28 grams of cocaine on the date alleged, the court properly limited the jury's consideration to the offense as charged; thus, reversal on this ground was unwarranted. *Brockington v. State*, 265 Ga. App. 13, 592 S.E.2d 858 (2003).

State did not rely solely on the testimony of the codefendant to convict the defendant of trafficking in amphetamine, so an instruction on accomplice testimony was not required; further, counsel was not ineffective in failing to submit a written request for instructions on accomplice testimony and corroboration. *Steed v. State*, 273 Ga. App. 845, 616 S.E.2d 185 (2005).

Jury charge failed to properly define the offenses of trafficking in methamphetamine and possession of methamphetamine with intent to distribute because all the jury was told was that it was a violation of the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., to traffic or possess with intent to distribute methamphetamine; the instructions given completely failed to inform the jury about the manner in which the offense of trafficking in methamphetamine or the offense of possessing methamphetamine with intent to distribute may have been committed. As such, the jury did not receive sufficient instructions to guide the jury in determining the defendant's guilt or innocence on these charges. *Torres v. State*, 298 Ga. App. 158, 679 S.E.2d 757 (2009).

Defendant was properly convicted of trafficking in methamphetamine in violation of O.C.G.A. § 16-13-31(e) because the trial court did not commit reversible error by refusing to charge the jury on the lesser-included offense of simple possession of methamphetamine, O.C.G.A. § 16-13-30, when there was no written request to give a charge on simple possession; even if the trial court erred in not giving the charge, reversal was not required in light of the overwhelming evidence that defendant possessed 432.31 grams of methamphetamine, which clearly constituted trafficking, and, therefore, it was highly unlikely that the failure to give an instruction on simple possession contributed to the verdict. *Gonzalez v. State*, 299 Ga. App. 777, 683 S.E.2d 878 (2009).

Failure to charge jury on lesser included offense was harmless error. — Trial court's failure to charge the jury on manufacturing methamphetamine, O.C.G.A. § 16-13-30(a), as a lesser included offense of trafficking methamphetamine, O.C.G.A. § 16-13-31(f), did not contribute to the verdict and was harmless; although the trial court was required to charge the jury on § 16-13-30(b) as a lesser included offense of § 16-13-31(f) since there was evidence that the defendant manufactured methamphetamine as prohibited by § 16-13-30(b), there was no relevant dis-

inction between the two statutes with regard to methamphetamine as applied to the case. Because the evidence established that the defendant manufactured methamphetamine, and the defendant's admission that the defendant was "cooking" showed that the defendant knowingly manufactured methamphetamine, the jury could have found the defendant guilty of both offenses or not guilty of both. *Poole v. State*, 302 Ga. App. 464, 691 S.E.2d 317 (2010).

Jury instruction on deliberate ignorance. — With regard to a defendant's conviction for trafficking in marijuana, the trial court properly denied the defendant's motion for a new trial since no error occurred with the trial court giving the state's requested instruction on deliberate ignorance as the defendant's actions in being paid to pick up a package from a shipping company, the defendant and the codefendant approaching the driver twice, giving a false name, and trying to allude the police, all supported the inference of deliberate ignorance. *Aguilera v. State*, 293 Ga. App. 523, 667 S.E.2d 378 (2008).

Failure to instruct on actual and constructive possession. — When the prosecution and defense of a case turned on proof, or the lack of proof, that each of three defendants had actual or constructive possession of the cocaine and other dangerous drugs found under the seat of the rented car in which the defendants were passengers, without any instruction on the law of possession, the jury was left without appropriate guidelines for reaching a verdict. The failure to so charge was substantial error and required reversal of defendants' convictions. *Ancrum v. State*, 197 Ga. App. 819, 399 S.E.2d 574 (1990).

Failure to instruct on mistake of fact not error. — In a criminal trial on a charge of trafficking in methamphetamine in violation of O.C.G.A. § 16-13-31(e), the trial court did not err when the court did not sua sponte instruct the jury on the affirmative defense of mistake of fact under O.C.G.A. § 16-3-5 as defendant's mistaken belief that the bag that defendant delivered contained marijuana rather than methamphetamine did not justify delivery of the package in any event. *Dimas v. State*, 276 Ga. App. 245, 622 S.E.2d 914 (2005).

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Instruction on constructive possession not harmful error. — Trial court's jury instruction on constructive possession was not harmful error, even though the indictment charged the defendant only with actual possession, since the evidence indisputably showed that immediately before defendant's arrest the defendant had actual possession of the crack cocaine at issue. *Cheeks v. State*, 234 Ga. App. 446, 507 S.E.2d 204 (1998).

Instruction on accident defense not warranted. — In an action in which defendant was charged with trafficking in methamphetamine in violation of O.C.G.A. § 16-13-31(e), a claim that defendant thought that defendant was delivering marijuana to an informant's girlfriend rather than methamphetamine, based on prior marijuana deliveries made by defendant for a drug dealer did not warrant a jury instruction on accident pursuant to O.C.G.A. § 16-2-2; that defense was unavailable to defendant, as defendant thought that defendant was committing a criminal act. *Dimas v. State*, 276 Ga. App. 245, 622 S.E.2d 914 (2005).

Evidence sufficient to support jury instruction on conspiracy. — With regard to a defendant's conviction for trafficking in marijuana, the trial court properly denied the defendant's motion for a new trial since no error occurred by the trial court giving the jury an instruction on conspiracy as evidence that the defendant and the codefendant were paid, jointly picked up a package containing drugs from a shipping company, and both refused to tell who hired the pair was sufficient to support that a conspiracy existed. *Aguilera v. State*, 293 Ga. App. 523, 667 S.E.2d 378 (2008).

Nolle prosequi on two counts after submission to jury required new trial. — Trial court erred in allowing the state to nolle prosequi the two methamphetamine possession charges over the defendant's objection and proceed only on a trafficking charge because the case had been submitted to the jury within the meaning of O.C.G.A. § 17-8-3. Also, this procedure essentially allowed the state to amend the indictment. *True-*

love v. State, 302 Ga. App. 418, 691 S.E.2d 549 (2010).

Evidence insufficient to show possession by vehicle passenger. — In a trial for possession of marijuana, when a codefendant, appearing as a defense witness, claimed ownership of the contraband and testified that the defendant and another had not known of the presence of contraband in the automobile, it was established without dispute that the defendant had neither a possessory nor a proprietary interest in the vehicle but was simply occupying the vehicle as a passenger. Therefore, the trial court erred in denying defendant's motion for directed verdict. *Llaguno v. State*, 197 Ga. App. 789, 399 S.E.2d 564 (1990).

Because defendant delivered a package containing drugs to an informant's girlfriend who was working with police, and there was no evidence that defendant asked the girlfriend to engage in anything or that defendant used language indicating a clear and present danger that a felony would be committed, the defendant was not entitled to a jury charge on criminal solicitation in violation of O.C.G.A. § 16-4-7(a). *Dimas v. State*, 276 Ga. App. 245, 622 S.E.2d 914 (2005).

Search of vehicle results in trafficking conviction. — When the defendant was free to go after a valid traffic stop, was not unreasonably detained or asked numerous questions unrelated to the traffic stop, defendant's constitutional rights were not violated when a police officer requested consent to search a car and defendant was subsequently convicted of trafficking in cocaine; the trial court did not err in denying defendant's motion to suppress. *Daniel v. State*, 260 Ga. App. 732, 580 S.E.2d 682 (2003), *aff'd*, 277 Ga. 840, 597 S.E.2d 116 (2004).

Record supported the trial court's judgment that a vehicle checkpoint that was established to check drivers' licenses, registrations, and proof of insurance was established for a legitimate purpose, that a police officer did not violate the defendant's rights when the officer walked a drug detection dog around the defendant's car while another officer was checking the validity of the defendant's driver's license, and that police had probable cause to

search the defendant's car after the dog alerted on the car; furthermore, the trial court properly denied a motion to suppress evidence which the defendant filed after the defendant was charged with trafficking in cocaine and possession of cocaine with intent to distribute, and the defendant was properly convicted of both offenses. *McCray v. State*, 268 Ga. App. 84, 601 S.E.2d 452 (2004).

Defendant's motion to suppress evidence of cocaine and crack pipes found during an inventory search of a car was properly denied as: (1) the police impound was not unlawful; (2) waiting a reasonable time, usually 20 minutes, prior to having the car towed, was not unreasonable as a matter of law; and (3) the officers were not required to call the defendant's relatives first. *Carlisle v. State*, 278 Ga. App. 528, 629 S.E.2d 512 (2006).

Withdrawal of guilty plea. — Trial court did not abuse the court's discretion in denying the defendant's motion to withdraw a guilty plea to charges of trafficking in methamphetamine and possession of marijuana as the defendant acknowledged, and the record showed, that the trial court advised the defendant of the maximum allowable sentence on both a trafficking in methamphetamine and possession of marijuana charge, as well as the mandatory minimum sentence on the former offense; further, despite the fact that the waiver of rights form the defendant signed incorrectly stated that the maximum term of imprisonment was 30 years, rather than 31 years, given the aforementioned, the mistake did not amount to a manifest injustice requiring reversal of the court's refusal to allow withdrawal. *Rodriguez v. State*, 280 Ga. App. 423, 634 S.E.2d 182 (2006).

Because the defendant's current counsel filed the motion to suppress the defendant claimed initial counsel failed to do, and because the defendant chose to enter a guilty plea to a violation of O.C.G.A. § 16-13-31(a)(1)(A) while that motion was pending, withdrawal of that plea based on an ineffective assistance of counsel claim due to initial counsel's failure to file that motion to suppress was not allowed as the evidence did not show that there was a reasonable probability that the defendant

would have insisted on going to trial but for counsel's failure to file a motion to suppress. *Lamb v. State*, 282 Ga. App. 756, 639 S.E.2d 641 (2006).

Habeas relief warranted for invalid indictment. — Denial of habeas relief was reversed after conviction for conspiracy to traffic in cocaine was based on an indictment alleging "a conspiracy to commit the crime of possessing a sufficient amount of a substance containing cocaine": this indictment was invalid as a matter of law. *Gonzalez v. Abbott*, 986 F.2d 461 (11th Cir. 1993), cert. denied, 510 U.S. 894, 114 S. Ct. 257, 126 L. Ed. 2d 210 (1993).

There was no fatal variance between the allegations of the indictment and the proof at trial when the defendant was charged with possession of a firearm during the commission of a crime by trafficking in methamphetamine, while defendant was charged, in another count, with trafficking in amphetamine rather than methamphetamine; trafficking in either methamphetamine or amphetamine fell within the categories set forth in O.C.G.A. § 16-13-31. *Sims v. State*, 258 Ga. App. 536, 574 S.E.2d 622 (2002).

Failure to timely raise constitutional challenge. — Failure of the defendant to raise the defendant's constitutional challenge to O.C.G.A. § 16-13-31 in the trial court, either before the jury rendered the jury's verdict or in an amended motion for a new trial, caused such a challenge to be unpreserved for review on appeal. *Goldsby v. State*, 273 Ga. App. 523, 615 S.E.2d 592 (2005).

Evidentiary issues did not warrant new trial. — Because the state's evidence sufficiently showed the first defendant's joint constructive possession of methamphetamine beyond mere spatial proximity, and the first defendant's act of testifying for the state without a promise of leniency or immunity did not unfairly prejudice the second defendant at the expense of that defendant's constitutional right not to testify, the defendants' convictions for trafficking in methamphetamine and possession of tools for the commission of a crime were upheld; thus, the trial court did not err in denying both defendants a new trial. *Herberman v. State*, 287 Ga. App.

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635, 653 S.E.2d 74 (2007).

Evidence of similar transaction properly admitted. — With regard to a defendant's conviction for trafficking in cocaine, the trial court did not err by admitting evidence of the defendant's 2004 arrest for trafficking in cocaine as a similar transaction since, despite the defendant's claims, sufficient similarities existed between the prior offense and the crime charged because the prior transaction involved the defendant's possession of a trafficking amount of cocaine and the defendant's intent and bent of mind to traffic in cocaine were at issue in the crime charged. *Celestin v. State*, 296 Ga. App. 727, 675 S.E.2d 480 (2009), cert. denied, No. S09C1200, 2009 Ga. LEXIS 340 (Ga. 2009).

Defendant was properly convicted of trafficking in methamphetamine, O.C.G.A. § 16-13-31, violating the Georgia Controlled Substances Act, O.C.G.A. § 16-13-30 et seq., and contributing to the delinquency of a minor, O.C.G.A. § 16-12-1, because the trial court properly admitted the state's similar transaction evidence when the evidence was introduced for the appropriate purpose of showing the defendant's knowledge and intent regarding the methamphetamine found in the defendant's room, and the trial court instructed the jury to consider the evidence for that limited purpose; both incidents occurred on the same street and both involved methamphetamine, and in both incidents police found the drugs in the defendant's bedroom along with scales. *Swan v. State*, 300 Ga. App. 667, 686 S.E.2d 310 (2009).

Suppression motion properly denied. — In a prosecution for trafficking in cocaine, the trial court did not err in denying the defendant's motion to suppress the cocaine seized after a valid traffic stop had essentially concluded as a state trooper's objective observations, when combined with the extensive experience the trooper possessed in drug interdiction and knowledge of drug smuggling patterns, supplied sufficient facts to conclude that the defendant might have been engaged in criminal activity. *Giles v.*

State, 284 Ga. App. 1, 642 S.E.2d 921 (2007).

Trial court did not err in dismissing as untimely a defendant's motion in limine to suppress unlawfully obtained evidence with regard to the defendant being charged with cocaine trafficking for which the defendant was later convicted because the defendant waived formal arraignment and pleaded not guilty, and more than three months later the defendant filed a motion in limine to suppress evidence, arguing that both the cocaine and any testimony regarding the cocaine should be excluded on the ground that both were products of an unlawful search of the home where the defendant and the cocaine were found; the defendant was unable to circumvent the requirements of Ga. Unif. Super. Ct. R. 31.1 by couching the defendant's motion to suppress as a motion in limine as the defendant's failure to file a timely motion to suppress the seized evidence waived any right to claim that the search which produced the evidence was unconstitutional. *Fraser v. State*, 283 Ga. App. 477, 642 S.E.2d 129 (2007).

Because the defendant's consent to search was not obtained by deceit, the defendant voluntarily accompanied officers to the motel room searched, and the consent was not the product of an illegal detention, suppression of the contraband seized was unwarranted. *Miller v. State*, 287 Ga. App. 179, 651 S.E.2d 103 (2007).

Trial court properly denied the defendant's motion to suppress the marijuana seized as the search of the defendant's truck was conducted after a valid traffic stop after the defendant gave the officer consent to conduct the search, and nothing supported the defendant's claim that this consent was coerced because the consent was obtained during a custodial interrogation and without the benefit of Miranda warnings as the officer's questioning did not unduly prolong the traffic stop and did not result in an unauthorized seizure or an equivalent custodial detention for which Miranda warnings were required. *Trujillo v. State*, 286 Ga. App. 438, 649 S.E.2d 573 (2007).

In a prosecution for trafficking in cocaine, the trial court did not err in denying

motions to suppress filed by the two defendants because: the officer (1) had a reasonable and sufficient basis for initiating a traffic stop of the car the defendants were traveling in based on a belief that the license plate on the subject vehicle might have belonged on another car, and hence, was illegally transferred; and (2) did not improperly prolong the stop once the defendants told conflicting stories of their travels and one declined to grant the officer consent to search. *Andrews v. State*, 289 Ga. App. 679, 658 S.E.2d 126 (2008), cert. denied, 2008 Ga. LEXIS 507 (Ga. 2008).

In a cocaine trafficking prosecution, although the defendant testified that an officer kicked in the door to the defendant's residence, the defendant's landlord testified that there was no damage to the front door, and the trial court was entitled to believe the officer's testimony that the door was open, thus, the officer was entitled to seize drugs seen in plain view through the open door and the defendant's motion to suppress the drugs was properly denied. *Reid v. State*, 298 Ga. App. 889, 681 S.E.2d 671 (2009).

Suppression motion properly granted. — Because the defendant did not grant consent to an officer to search the defendant's purse, and no other exception to the warrant requirement allowing a search of the purse applied, the trial court properly granted suppression of the drugs seized from within the purse. *State v. Fulghum*, 288 Ga. App. 746, 655 S.E.2d 321 (2007).

Suppression motion improperly denied. — Police officers lacked a reasonable articulable suspicion necessary to justify the officers' presence in the backyard of a home where the officers were conducting a first-tier encounter "knock and talk," and the officers' detention of the home's occupants as the occupants fled out the back door was unlawful. Therefore, methamphetamine seen through the back door of the home was not in "plain view" and was required to be suppressed. *Galindo-Eriza v. State*, 306 Ga. App. 19, 701 S.E.2d 516 (2010).

Counsel's deficiency did not warrant a new trial. — While the defendant's trial counsel was ineffective in fail-

ing to object to that portion of the state's closing argument in which the prosecutor referenced a slain officer's funeral a week prior, as that fact had no relevance to the charges the defendant was facing, based on the overwhelming evidence of guilt, including the defendant's admission, the defendant's convictions for trafficking in cocaine and possession of cocaine with intent to distribute were upheld on appeal; thus, a new trial was properly denied. *Cantrell v. State*, 290 Ga. App. 651, 660 S.E.2d 468 (2008).

Cited in *Speight v. Whiddon*, 516 F. Supp. 905 (M.D. Ga. 1980); *Little v. State*, 157 Ga. App. 462, 278 S.E.2d 17 (1981); *Holley v. State*, 157 Ga. App. 863, 278 S.E.2d 738 (1981); *Hartley v. State*, 159 Ga. App. 157, 282 S.E.2d 684 (1981); *Printup v. State*, 159 Ga. App. 574, 284 S.E.2d 82 (1981); *State v. Shuman*, 161 Ga. App. 304, 287 S.E.2d 757 (1982); *Dalton v. State*, 162 Ga. App. 7, 289 S.E.2d 801 (1982); *Arp v. State*, 249 Ga. 403, 291 S.E.2d 495 (1982); *Connell v. State*, 163 Ga. App. 53, 293 S.E.2d 367 (1982); *McAdoo v. State*, 164 Ga. App. 23, 295 S.E.2d 114 (1982); *McDaniel v. State*, 172 Ga. App. 562, 323 S.E.2d 866 (1984); *Jones v. State*, 174 Ga. App. 783, 331 S.E.2d 633 (1985); *Brunetti v. State*, 176 Ga. App. 184, 335 S.E.2d 414 (1985); *Hall v. State*, 176 Ga. App. 498, 336 S.E.2d 604 (1985); *Dunn v. State*, 178 Ga. App. 6, 341 S.E.2d 877 (1986); *Luke v. State*, 178 Ga. App. 614, 344 S.E.2d 452 (1986); *Robinson v. State*, 256 Ga. 564, 350 S.E.2d 464 (1986); *Hamilton v. State*, 181 Ga. App. 279, 351 S.E.2d 705 (1986); *Brown v. State*, 181 Ga. App. 768, 353 S.E.2d 572 (1987); *Sablon v. State*, 182 Ga. App. 128, 355 S.E.2d 88 (1987); *Lockwood v. State*, 184 Ga. App. 262, 361 S.E.2d 195 (1987); *State v. Benzaquen*, 184 Ga. App. 392, 361 S.E.2d 503 (1987); *McIntosh v. State*, 185 Ga. App. 612, 365 S.E.2d 454 (1988); *Borda v. State*, 187 Ga. App. 49, 369 S.E.2d 327 (1988); *Beguiristain v. State*, 187 Ga. App. 164, 369 S.E.2d 774 (1988); *Garcia v. State*, 187 Ga. App. 166, 369 S.E.2d 776 (1988); *Santone v. State*, 187 Ga. App. 789, 371 S.E.2d 428 (1988); *Deych v. State*, 188 Ga. App. 901, 374 S.E.2d 753 (1988); *Coleman v. State*, 189 Ga. App. 366, 375 S.E.2d 663 (1988);

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Christopher v. State, 190 Ga. App. 393, 379 S.E.2d 205 (1989); Villa v. State, 190 Ga. App. 530, 379 S.E.2d 417 (1989); Samuel v. State, 190 Ga. App. 539, 379 S.E.2d 571 (1989); Ramirez v. State, 190 Ga. App. 889, 380 S.E.2d 323 (1989); Brown v. State, 190 Ga. App. 818, 380 S.E.2d 349 (1989); Wiltshire v. State, 191 Ga. App. 426, 382 S.E.2d 166 (1989); State v. Freeman, 191 Ga. App. 541, 382 S.E.2d 664 (1989); Allen v. State, 191 Ga. App. 623, 382 S.E.2d 690 (1989); Oglesby v. State, 192 Ga. App. 165, 384 S.E.2d 192 (1989); Bassett v. State, 192 Ga. App. 293, 384 S.E.2d 402 (1989); Causey v. State, 192 Ga. App. 294, 384 S.E.2d 674 (1989); Ragin v. State, 192 Ga. App. 686, 385 S.E.2d 770 (1989); Betha v. State, 192 Ga. App. 789, 386 S.E.2d 515 (1989); Allen v. State, 193 Ga. App. 16, 387 S.E.2d 11 (1989); Boatwright v. State, 193 Ga. App. 141, 387 S.E.2d 386 (1989); Hamlin v. State, 193 Ga. App. 453, 388 S.E.2d 48 (1989); Romano v. State, 193 Ga. App. 682, 388 S.E.2d 757 (1989); McCrief v. State, 193 Ga. App. 667, 388 S.E.2d 859 (1989); Jackson v. State, 193 Ga. App. 636, 388 S.E.2d 881 (1989); McCrief v. State, 260 Ga. 87, 390 S.E.2d 32 (1990); Randall v. State, 194 Ga. App. 153, 390 S.E.2d 74 (1990); Mallarino v. State, 194 Ga. App. 212, 390 S.E.2d 114 (1990); Garmon v. State, 194 Ga. App. 401, 390 S.E.2d 882 (1990); Rose v. State, 195 Ga. App. 399, 393 S.E.2d 459 (1990); Boatwright v. State, 195 Ga. App. 440, 393 S.E.2d 707 (1990); Hollingsworth v. State, 195 Ga. App. 502, 394 S.E.2d 131 (1990); Jones v. State, 195 Ga. App. 868, 395 S.E.2d 69 (1990); Langham v. State, 196 Ga. App. 71, 395 S.E.2d 345 (1990); White v. State, 196 Ga. App. 813, 397 S.E.2d 299 (1990); Santana v. State, 197 Ga. App. 204, 397 S.E.2d 629 (1990); Knight v. State, 197 Ga. App. 250, 398 S.E.2d 202 (1990); Sanchez v. State, 197 Ga. App. 470, 398 S.E.2d 740 (1990); Guerrero v. State, 198 Ga. App. 397, 401 S.E.2d 749 (1991); Jones v. State, 198 Ga. App. 881, 403 S.E.2d 867 (1991); Dumas v. State, 199 Ga. App. 582, 405 S.E.2d 571 (1991); Murrell v. State, 200 Ga. App. 231, 407 S.E.2d 460 (1991); Oyola v. Bowers, 947

F.2d 928 (11th Cir. 1991); King v. State, 201 Ga. App. 391, 411 S.E.2d 278 (1991); Merriman v. State, 201 Ga. App. 817, 412 S.E.2d 598 (1991); Kemp v. State, 201 Ga. App. 629, 411 S.E.2d 880 (1991); King v. State, 203 Ga. App. 287, 416 S.E.2d 842 (1992); Orman v. State, 207 Ga. App. 671, 428 S.E.2d 813 (1993); State v. Williams, 212 Ga. App. 164, 441 S.E.2d 501 (1994); Capers v. State, 220 Ga. App. 869, 470 S.E.2d 887 (1996); Lovain v. State, 253 Ga. App. 271, 558 S.E.2d 812 (2002); Palmer v. State, 257 Ga. App. 650, 572 S.E.2d 27 (2002); Jones v. State, 258 Ga. App. 337, 574 S.E.2d 398 (2002); Lawton v. State, 281 Ga. 459, 640 S.E.2d 14 (2007); Bell v. State, 291 Ga. App. 169, 661 S.E.2d 207 (2008); Cantrell v. State, 290 Ga. App. 651, 660 S.E.2d 468 (2008); Locher v. State, 293 Ga. App. 67, 666 S.E.2d 468 (2008); Kim v. State, 298 Ga. App. 402, 680 S.E.2d 469 (2009); Scott v. State, 298 Ga. App. 376, 680 S.E.2d 482 (2009); Proctor v. State, 298 Ga. App. 388, 680 S.E.2d 493 (2009); Thomas v. State, 299 Ga. App. 235, 682 S.E.2d 325 (2009); Perkins v. State, 300 Ga. App. 464, 685 S.E.2d 300 (2009); Cox v. State, 300 Ga. App. 109, 684 S.E.2d 147 (2009); Martinez v. State, 303 Ga. App. 166, 692 S.E.2d 766 (2010).

Possession

Law recognizes two kinds of possession, actual possession and constructive possession. A person who knowingly has direct physical control over a thing at a given time is in actual possession of the thing. A person who, though not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing is then in constructive possession. Lockwood v. State, 257 Ga. 796, 364 S.E.2d 574 (1988); Chews v. State, 187 Ga. App. 600, 371 S.E.2d 124 (1988).

Constructive possession insufficient to support trafficking conviction. — After the defendant was charged with both trafficking in cocaine and possession with intent to distribute, and the instructions given by the court were not separated as to the two counts, the court erred in charging both constructive and actual possession with regard to the trafficking count. While constructive posses-

sion will support possession with intent to distribute, it will not support a trafficking conviction under O.C.G.A. § 16-13-31. *Edwards v. State*, 194 Ga. App. 571, 391 S.E.2d 137 (1990) (decided under facts existing prior to 1988 amendment which deleted “actual” preceding “possession”).

Possession offenses included in trafficking. — Offenses of possession of cocaine and possession of cocaine with intent to distribute were lesser included offenses, as a matter of fact, of the trafficking offense since proof of the two possession offenses was established by “the same or less than all the facts” required to establish the distribution offense; thus, it was error to convict defendant of all three offenses. *Hancock v. State*, 210 Ga. App. 528, 437 S.E.2d 610 (1993).

When the indictment charged defendant with trafficking in cocaine by possessing more than 28 ounces, the trial court erred in refusing to give defendant’s requested charge on the lesser included offense of simple possession of cocaine. *Howard v. State*, 220 Ga. App. 579, 469 S.E.2d 746 (1996); *Lumpkin v. State*, 245 Ga. App. 627, 538 S.E.2d 514 (2000).

Because the evidence was that the defendant was in actual possession of cocaine buried in the defendant’s backyard, the defendant could not claim harmful error arising out of the superior court’s charge indicating that the jury could convict upon a finding of actual, joint, or constructive possession thereof notwithstanding the defendant’s indictment upon actual possession alone. *Williams v. State*, 247 Ga. App. 88, 543 S.E.2d 402 (2000).

Constructive possession sufficient. — Either actual or constructive possession suffices to establish the element of “possession” necessary to support a conviction of trafficking in controlled substances. *Williams v. State*, 199 Ga. App. 566, 405 S.E.2d 716 (1991); *Gamble v. State*, 223 Ga. App. 653, 478 S.E.2d 455 (1996).

Defendant may be convicted under O.C.G.A. § 16-13-31 of trafficking in cocaine based on a finding of either actual or constructive possession. *Cheeks v. State*, 234 Ga. App. 446, 507 S.E.2d 204 (1998).

Testimony by two of defendant’s cohorts that defendant directed one of them to

pull the cocaine from under the front seat and hide it in a cup was sufficient evidence of defendant’s constructive possession of the cocaine to support a trafficking conviction. *Thomas v. State*, 261 Ga. App. 493, 583 S.E.2d 207 (2003).

Even if a bag containing methamphetamine was found on the floorboard of the van in which the defendant was riding, as the defendant claimed, instead of on the defendant’s person, the evidence sufficed to show constructive possession of the bag; the bag was in plain view at the defendant’s feet, and the methamphetamine in the bag was packaged in the same way as the methamphetamine in a container that was found on the defendant’s person. *Hulsey v. State*, 284 Ga. App. 461, 643 S.E.2d 888 (2007).

Actual possession. — Person who knowingly has direct physical control over a thing at a given time is in “actual possession” of the thing, as when a person has the keys to a locked airplane or a locked suitcase where marijuana is found. *Evans v. State*, 167 Ga. App. 396, 306 S.E.2d 691 (1983).

Legislature did not intend the phrase “actual possession” in O.C.G.A. § 16-13-31(c) to mean that a person would be holding marijuana in the person’s hand or have the marijuana physically on the person because the punishment for trafficking in marijuana is divided into three categories of 100 to less than 2,000 pounds; 2,000 to less than 10,000 pounds; and more than 10,000 pounds. For a person to have such large amounts of marijuana “on his person” in order to constitute actual possession would be a physical impossibility in most instances. *Evans v. State*, 167 Ga. App. 396, 306 S.E.2d 691 (1983) (decided prior to 1988 amendment which deleted “actual” preceding “possession”), overruled on other grounds, *Teague v. State*, 252 Ga. 534, 314 S.E.2d 910 (1984).

“Actual possession” required by O.C.G.A. § 16-13-31 to authorize a conviction for trafficking refers not merely to physical custody, but refers to actual active participation in the possession of such substances so as to be a party to the crime of trafficking. *Dukes v. State*, 186 Ga. App.

Possession (Cont'd)

815, 369 S.E.2d 259 (1988); *Green v. State*, 187 Ga. App. 373, 370 S.E.2d 348, cert. denied, 187 Ga. App. 907, 370 S.E.2d 348 (1988).

When a jury issue exists as to whether the defendant was exercising actual or constructive possession of cocaine, the lesser offense of possession of cocaine was reasonably raised by the evidence, and the trial court committed prejudicial error in failing to instruct pursuant to the defendant's written request. *Alvarado v. State*, 194 Ga. App. 781, 391 S.E.2d 668, aff'd, 260 Ga. 563, 397 S.E.2d 550 (1990).

Although the defendant never had physical possession of cocaine and marijuana in the cab from which the cocaine was delivered, the defendant aided and abetted its actual physical possession and is guilty of the offense of trafficking under O.C.G.A. §§ 16-2-20 and 16-13-31 as a party to the crime. The "actual possession" required by O.C.G.A. § 16-13-31 to authorize a conviction for trafficking refers not merely to physical custody but to actual active participation in the possession of such substances so as to be a party to the crime of trafficking. *Holder v. State*, 194 Ga. App. 790, 391 S.E.2d 808 (1990).

Evidence sufficient to prove constructive, joint possession. — When police officers in execution of a no-knock search warrant on the home where the teenage defendant lived with the defendant's mother found a sock with cocaine in the sock floating in a toilet of a bathroom that defendant had exited, defendant's cousin acknowledged seeing defendant with the sock earlier and suspecting drugs were in the sock, and the officers also found marijuana and crack cocaine in a cigar box defendant admitted owning during an earlier detention hearing, the evidence was sufficient to prove defendant was in constructive, joint possession of the drugs. *In re R.S.*, 253 Ga. App. 409, 559 S.E.2d 143 (2002).

Despite the defendant's contrary claim, the state presented sufficient evidence that the defendant and the codefendants had joint constructive possession of the contraband seized, and that the jury could reject the defendant's equal access de-

fense, given that: (1) some of that contraband was found in a bedroom in which the defendant slept and underneath the defendant's mattress; and (2) a large amount of cash was found in the defendant's purse. *Castillo v. State*, 288 Ga. App. 828, 655 S.E.2d 695 (2007).

When the defendants, a married couple who were in a car with a third person, were charged with trafficking in cocaine, possession of cocaine with intent to distribute, possession of amphetamine, and possession of a firearm during certain crimes, there was sufficient evidence that the defendants had joint constructive possession of a duffel bag in which drugs and a weapon were found. The evidence showed that one spouse exercised control over the car that transported the contraband and that the other spouse tried to retrieve a paper sack inside the duffel bag at the sheriff's office with suspicious and inconsistent explanations. *Howard v. State*, 291 Ga. App. 289, 661 S.E.2d 644 (2008).

Equal access rule did not apply. — Because the defendant's possession of the 400 grams of methamphetamine found inside a vehicle was established by other circumstantial evidence besides ownership, use, or possession of the vehicle, the equal access rule did not entitle the defendant to an acquittal of the drug trafficking charge. The issue of whether the drugs belonged to the defendant was for the jury's determination and an appellate court cannot reweigh the evidence and reassess the witnesses' credibility. *Evans v. State*, 288 Ga. App. 103, 653 S.E.2d 520 (2007).

Because the state was not relying upon the defendant's ownership or control of the residence in order to link the ownership and possession of the methamphetamine found to the defendant, a charge on equal access was not authorized by the evidence. *Thrasher v. State*, 289 Ga. App. 399, 657 S.E.2d 316 (2008).

Evidence sufficient despite no ownership or rental of home. — Evidence was sufficient to prove that two defendants knowingly possessed cocaine and marijuana found in a house to which both defendants had keys and where the defen-

dants' belongings were located as required by O.C.G.A. §§ 16-13-31(a) and 16-13-30(j)(1), although defendants did not own or rent the house. *Lott v. State*, 303 Ga. App. 775, 694 S.E.2d 698 (2010).

Aiding and abetting possession. — Whether or not the defendant had physical possession of cocaine, the defendant aided and abetted the cocaine's actual physical possession and was guilty of the offense of trafficking under O.C.G.A. §§ 16-2-20 and 16-13-31 as a party to the crime. *Barrett v. State*, 183 Ga. App. 729, 360 S.E.2d 400 (1987), overruled on other grounds, *Gonzalez v. Abbott*, 262 Ga. 671, 425 S.E.2d 272 (1993).

Jury could find the defendant mother and her son guilty of joint actual possession of cocaine either directly or as intentional aiders and abettors or intentional encouragers. As to the indirect roles, there was ample evidence that at the least, the mother was permitting direct committers to use her apartment for trafficking, providing a haven, and her son was intentionally encouraging the trafficking by himself being a direct receiver. *Heath v. State*, 186 Ga. App. 655, 368 S.E.2d 346 (1988).

Inference of ownership from possession of premises. — When immediate and exclusive possession of an automobile, locker room, or other premises is shown, the inference is authorized that the owner of such property is the owner of what is contained therein, and this inference has been referred to as a rebuttable presumption; however, as to automobiles, the rule does not apply where there is evidence in the case that the defendant has not been in possession of the vehicle for a period of time prior to the discovery of the contraband or that others have had access to the vehicle. *Robinson v. State*, 175 Ga. App. 769, 334 S.E.2d 358 (1985).

Defendant's convictions for trafficking in cocaine and possession of heroin with intent to distribute was sustained even though the evidence connecting the defendant to the apartment was circumstantial. *Williams v. State*, 262 Ga. App. 67, 584 S.E.2d 625 (2003).

Driver of automobile as possessor. — If a person is driving an automobile or has an automobile in the person's possession, custody, or control, all that is in that

automobile is presumed to be the person's and in the person's possession, and whether or not the evidence was sufficient to rebut the inference arising from the finding of the drugs in the automobile is a question for the jury to decide. *Reed v. State*, 186 Ga. App. 539, 367 S.E.2d 809 (1988).

When the two defendants were occupants of a car rented by another in Florida which was stopped for speeding, and each admitted driving the vehicle at alternate times, the evidence was sufficient to enable any rational trier of fact to find beyond a reasonable doubt that both defendants had possession of the 112 pounds of marijuana found in the car trunk. *Coop v. State*, 186 Ga. App. 578, 367 S.E.2d 836 (1988).

The "actual possession" that was required for a conviction for trafficking in cocaine did not mean that the person had to be holding the contraband in the person's hand or have the contraband physically on the person. If a person was driving an automobile or had an automobile in the person's possession, custody, or control, all property in that automobile was presumed to be the person's and in the person's possession. *Johnson v. State*, 195 Ga. App. 577, 394 S.E.2d 359 (1990).

Although the defendant argued that the defendant's passenger had equal access to 27.1 grams of methamphetamine that were found taped under the console tray of the defendant's truck, the state sufficiently proved the defendant's possession. *Dalton v. State*, 261 Ga. App. 72, 581 S.E.2d 700 (2003).

There was sufficient evidence to show that the defendant was in joint constructive possession of drugs found under the passenger seat of a car the defendant was driving; at a minimum, there was evidence that the defendant was transporting the passenger, a codefendant, in a car knowing that the passenger was in possession of the bag containing methamphetamine. *Waters v. State*, 280 Ga. App. 566, 634 S.E.2d 508 (2006).

Head of household presumption of possession of contraband found therein is no longer a viable presumption in Georgia. *Ramsay v. State*, 175 Ga. App. 97, 332 S.E.2d 390 (1985).

Possession (Cont'd)

Possession of mixture in conspiracy to traffic in cocaine. — State proved the conspiracy to traffic cocaine charge by showing that defendant knowingly possessed 28 grams or more of cocaine and that one of the conspirators took an overt act to possess the cocaine. The conviction was not invalid on the ground that the indictment alleged defendant possessed pure cocaine, but the evidence showed that the cocaine was a mixture, as the crime could be proved by either showing that a defendant possessed pure cocaine or cocaine mixtures, and the state was not required to prove every substantive element of the offense since defendant was charged with conspiracy to traffic, not trafficking itself. *Allison v. State*, 259 Ga. App. 775, 577 S.E.2d 845 (2003).

Evidence of possession sufficient. — There was sufficient evidence that the defendant possessed a briefcase of cocaine, although other people were present in the house; the briefcase was in the same room where an officer had bought cocaine from the defendant no more than an hour before, the officer had seen other cocaine there at the time, and the defendant had gone to that room before admitting other officers into the house. *Daugherty v. State*, 283 Ga. App. 664, 642 S.E.2d 345 (2007).

With regard to defendant's conviction for trafficking in methamphetamine, the trial court properly denied defendant's motion for a new trial, which was based on the trial court improperly admitting evidence of a witness's statements made during a polygraph examination as the evidence, which indicated that defendant sold methamphetamine, did not go to proving what defendant was indicted for, namely trafficking methamphetamine since possessing the drug in a certain amount was also a way of proving the crime. Further, defendant was able to fully call into issue the witness's motive for testifying. *Corn v. State*, 290 Ga. App. 792, 660 S.E.2d 782 (2008).

Evidence supported convictions for misdemeanor marijuana possession and cocaine trafficking under O.C.G.A. §§ 16-13-2 and 16-13-31 when officers ex-

ecuting a search warrant found the defendant alone in a house near bags of marijuana and with the house containing over 28 grams of cocaine, a loaded handgun, and \$596; furthermore, an officer conducting surveillance and using an informant had previously observed the defendant's involvement in the sale of drugs at the home. *Boyd v. State*, 291 Ga. App. 528, 662 S.E.2d 295 (2008).

Internal possession. — When a customs agent had a reasonable suspicion that the defendant could have been carrying drugs internally, the trial court properly denied the defendant's contention that the defendant signed a consent form out of frustration and due to fatigue. *Blackwood v. State*, 261 Ga. App. 110, 581 S.E.2d 724 (2003).

Quantity of Contraband

Legislative intent. — By enacting O.C.G.A. § 16-13-31(b), the legislature clearly authorized a trafficking conviction based upon knowing possession of four or more grams of opium; although defendant disagreed that such possession established "trafficking," the appellate court could not ignore the clear statutory language governing the case. *Nahid v. State*, 276 Ga. App. 687, 624 S.E.2d 264 (2005).

Defendant's knowledge of quantity. — O.C.G.A. § 16-13-31 requires as the mens rea that defendant know that defendant possesses cocaine but it does not require that defendant know that the substance possessed weighs at least 28 grams. *Cleveland v. State*, 218 Ga. App. 661, 463 S.E.2d 36 (1995).

Evidence of weight. — Testimony of expert as to the weight of the marijuana produced by a given quantity of marijuana plants which were seized, together with photographs of the plants, is sufficient to establish the weight of the plants which had been destroyed upon confiscation. *Evans v. State*, 176 Ga. App. 818, 338 S.E.2d 48 (1985).

Evidence showing that the total weight of confiscated marijuana plants, including stalks, stems, and leaves, was 10,340 pounds was sufficient to allow the jury to conclude that the marijuana leaves alone weighed more than 100 pounds.

Westberry v. State, 178 Ga. App. 243, 342 S.E.2d 737 (1986).

When the defendant was indicted for being “knowingly in actual possession of more than 400 grams of cocaine, a schedule two controlled substance, and a mixture with a purity of more than 10 percent of cocaine,” but the evidence showed the total mass of the substance to be 450 grams, of which 71 percent or 319 grams was pure cocaine, it was held that since the amount shown would still show a violation of law, even if it did not meet the increment charged, there would not be a material variance between the allegata and probata. *Partridge v. State*, 187 Ga. App. 325, 370 S.E.2d 173, cert. denied, 187 Ga. App. 908, 370 S.E.2d 173 (1988).

Evidence was sufficient to support defendant's conviction for trafficking in amphetamine after the state's chemist testified that the bag containing the drug weighed 251.1 grams; the only reasonable interpretation of the testimony was that the substance inside the “plastic ziploc type” bag weighed 251.1 grams. *Emilio v. State*, 257 Ga. App. 49, 570 S.E.2d 372 (2002).

Statute does not require state to establish purity of substance. — Trial court did not err in denying the defendant's post-trial motion to require the state crime lab to test the substance contained in the corner tie that the defendant sold to an undercover officer as heroin to determine the purity of the heroin it contained because the defendant was able to elicit testimony from the expert from the state crime lab that the tests the expert performed did not establish the purity of the substance and that the crime lab did not have the ability to test for the purity of heroin contained in a sample; O.C.G.A. § 16-13-31(b) does not require that the substance containing heroin exceed any purity threshold. *Thomas v. State*, 306 Ga. App. 279, 701 S.E.2d 895 (2010).

Mixture or purity of drugs. — Subsection (e) treats pure methamphetamine and a mixture containing methamphetamine equally; accordingly, any variance in proof at trial regarding whether the substance was a mixture containing methamphetamine or pure methamphetamine is not fatal. *Bellamy v. State*, 243 Ga. App. 575, 530 S.E.2d 243 (2000).

Trial court's instruction to the jury that trafficking in amphetamine could be accomplished by possessing “amphetamine or any mixture of amphetamine” did not create the possibility that defendant was convicted of an offense not charged since O.C.G.A. § 16-13-31(e)(2) did not establish two different methods of trafficking based on the purity of the drug. *Emilio v. State*, 257 Ga. App. 49, 570 S.E.2d 372 (2002).

Trial counsel was not ineffective in failing to raise a constitutional challenge to O.C.G.A. § 16-13-31(e) based on the statute's allowance of a conviction for trafficking in methamphetamine if a defendant possessed 28 grams or more, regardless of the purity of the methamphetamine mixture, while O.C.G.A. § 16-13-31(a) only allowed a conviction for trafficking in cocaine if the mixture of cocaine had a purity of at least 10 percent; the proposed challenge was not supported by the evidence as the state's expert testified that 56.2 grams of the 79.0 grams of the substance tested was positive for methamphetamine, and there was no proffer or evidence as to the purity of the mixture or any allegation by defendants that the substance was not methamphetamine. *Christopher v. State*, 262 Ga. App. 257, 585 S.E.2d 107 (2003).

Quantity of drugs averred controls mandatory minimum sentence. — It is that quantity of drugs averred in the indictment of which the offender has been convicted, rather than the amount of drugs which the evidence establishes that the offender possessed in excess of the amount averred in the indictment, that controls in determining which mandatory minimum sentence is operative under O.C.G.A. § 16-13-31(a). *Mallarino v. State*, 190 Ga. App. 398, 379 S.E.2d 210 (1989), aff'd, 194 Ga. App. 212, 390 S.E.2d 114 (1990).

Reasonable doubt existed as to whether more than 100 pounds of marijuana was confiscated. *Payton v. State*, 177 Ga. App. 104, 338 S.E.2d 462 (1985).

No remotely reasonable doubt that at least 100 pounds of chargeable marijuana was trafficked in. *Lang v. State*, 165 Ga. App. 576, 302 S.E.2d 683, cert. denied, 464 U.S. 937, 104 S. Ct. 346, 78 L. Ed. 2d 312 (1983).

Quantity of Contraband (Cont'd)**Destruction of bulk of evidence harmless beyond reasonable doubt.**

— When the evidence is overwhelming that the defendant possessed more than 100 pounds of marijuana, the destruction of all but 100 grams without notice to defendant or defendant's attorney, even if it was erroneous, was harmless beyond a reasonable doubt, and if only by accident, did not prevent the state from proving possession of 100 pounds. *Lang v. State*, 165 Ga. App. 576, 302 S.E.2d 683, cert. denied, 464 U.S. 937, 104 S. Ct. 346, 78 L. Ed. 2d 312 (1983).

Separate lots of drugs. — Defendant possessed requisite 28 grams of cocaine, even though it was found in two individual lots totalling 47.5 grams in defendant's house and truck and neither lot amounted to 28 grams. *Hite v. State*, 206 Ga. App. 245, 424 S.E.2d 885 (1992); *Snoke v. State*, 237 Ga. App. 686, 516 S.E.2d 541 (1999).

Agreement relating to the sale or delivery of amounts of less than 28 grams cannot support a conspiracy to traffic in methamphetamine, even if the amounts sold over time amount to 28 grams or more, as the plain language of O.C.G.A. § 16-13-31(e) requires a transaction involving 28 grams or more; additionally, the coconspirators must act "together with" one another to commit the crime of trafficking. *Pruitt v. State*, 264 Ga. App. 44, 589 S.E.2d 864 (2003).

Multiple charges not allowed. — Language of O.C.G.A. § 16-13-31, "28 grams or more," would not allow the prosecutor to divide the amount discovered during a search for the purpose of creating multiple charges. *Snoke v. State*, 237 Ga. App. 686, 516 S.E.2d 541 (1999).

State not required to prove THC content of marijuana. — Despite the defendant's contrary claim, the state was not required to prove the tetrahydrocannabinol (THC) content of the plant material seized in a prosecution for trafficking in marijuana; further, THC was treated separately in the criminal code as a Schedule I drug under O.C.G.A. § 16-13-25(3)(P). *Trujillo v. State*, 286 Ga. App. 438, 649 S.E.2d 573 (2007).

No evidence of lesser included offense of possession of cocaine.

— With regard to a defendant's conviction for trafficking in cocaine, the trial court did not err by failing to charge the jury on the lesser included offense of possession of cocaine with intent to distribute as there was no dispute that the cocaine exceeded the amount necessary to sustain a trafficking conviction, therefore, there was no evidence of the lesser included offense. However, even if the trial court's failure to give the requested instruction was error, it is highly probable that the error did not contribute to the verdict in light of the overwhelming evidence that the defendant committed the greater offense. *Celestin v. State*, 296 Ga. App. 727, 675 S.E.2d 480 (2009), cert. denied, No. S09C1200, 2009 Ga. LEXIS 340 (Ga. 2009).

Sufficiency of Evidence**Evidence held sufficient to show defendant possessed marijuana fields**

from which bulk of marijuana was confiscated. *Meeks v. State*, 178 Ga. App. 9, 341 S.E.2d 880 (1986).

Evidence established chain of custody.

— In a prosecution for trafficking in cocaine, the state established a chain of custody for the drugs with: 1) testimony of the officer who found the drugs; 2) testimony of the officer who placed the drugs in an evidence bag, which the officer then sealed, labeled, and transported to the crime lab; 3) that officer's identification of the state's exhibit as that bag; and 4) testimony of a Georgia Crime Lab chemist, who identified the exhibit as the bag containing the substance the chemist tested. Testimony of another chemist who had inspected the drugs was not required since, absent evidence of tampering, the crime lab could be treated as a single link in the chain of custody for admissibility purposes. *Simmons v. State*, 299 Ga. App. 21, 681 S.E.2d 712 (2009).

Defendant was properly convicted for trafficking in marijuana

as the defendant owned a farm used by the defendant's son to grow marijuana, the defendant helped to construct building used to grow marijuana, and the defendant helped acquire necessary support devices

to put the building into operation; this evidence authorized the jury to find that the defendant's son had actual possession of the marijuana and that the defendant had constructive possession by aiding and abetting the son's possession. *Lang v. State*, 171 Ga. 368, 320 S.E.2d 185 (1984).

Because the state presented sufficient evidence that identified the contraband seized as marijuana, and it was not unreasonable for the court to conclude that the two lightweight nylon duffel bags seized, along with some plastic wrap, weighed less than 40 pounds, a rational trier of fact could have found proof beyond a reasonable doubt that the amount of marijuana seized from the defendant was at least the equivalent of the amount charged in the indictment; thus, the defendant's trafficking conviction was upheld on appeal. *Trujillo v. State*, 286 Ga. App. 438, 649 S.E.2d 573 (2007).

Evidence supported conviction of trafficking in marijuana since, when a package that a parcel service and police had found to contain marijuana was delivered to the place where defendant rented a mailbox, defendant took possession of the package and said that the package contained Christmas presents, then took the package to defendant's truck and was arrested; it was only just before the package was opened at a police station that the defendant said the package was not the property of the defendant. *Hitchcock v. State*, 291 Ga. App. 455, 662 S.E.2d 155 (2008).

Defendant's conviction for trafficking in marijuana was authorized because the defendant, a roommate, and an accomplice were willing participants in the drug offenses, and the defendant agreed to accept delivery of the package of marijuana at the defendant's residence in exchange for \$200 and an ounce of marijuana for the defendant's personal consumption; whether the defendant had physical possession of the cocaine, the defendant aided and abetted the marijuana's actual physical possession and was guilty of the offense of trafficking under O.C.G.A. § 16-13-31(c) and under O.C.G.A. § 16-2-20 as a party to the crime because the defendant admitted that the defendant was aiding the accomplice's efforts to

commit the trafficking offense by giving the accomplice a safe haven and a means to avoid law enforcement detection. *Park v. State*, No. A10A1799, 2011 Ga. App. LEXIS 265 (Mar. 23, 2011).

Belief by jury of informant over defendant. — Evidence in cocaine trafficking case did not require a directed verdict on the basis of entrapment; although defendant claimed a confidential informant repeatedly contacted defendant about arranging a sale, the informant testified that defendant contacted the informant and offered to set up the sale, and the jury was entitled to reject defendant's version and accept the informant's. *Mulvey v. State*, 250 Ga. App. 345, 551 S.E.2d 412 (2001).

Evidence was sufficient to support defendant's conviction for trafficking in marijuana where: (1) an informant testified at trial that the informant purchased marijuana from defendant, which was corroborated by the recovery of a large quantity of marijuana from the informant's vehicle; (2) an expert confirmed that the substance recovered from the informant's vehicle weighed well in excess of the 50-pound threshold for trafficking established by O.C.G.A. § 16-13-31(c); and (3) in a taped statement, defendant admitted buying 125 pounds of marijuana and selling 100 pounds. *Whitehead v. State*, 258 Ga. App. 271, 574 S.E.2d 351 (2002).

Evidence constituted substantial step towards drug trafficking. — Circumstantial evidence was sufficient to allow the jury to exclude every reasonable hypothesis save the guilt of the defendant with regard to convicting the defendant of marijuana trafficking because the evidence authorized the jury to find that by entering a vehicle used in a police sting operation, the defendant took a substantial step towards marijuana trafficking in that the defendant made a substantial step towards possessing the marijuana. *Drammeh v. State*, 285 Ga. App. 545, 646 S.E.2d 742 (2007).

Evidence sufficient to support conviction of possession. — Evidence, although it was for the most part circumstantial, was sufficient for a rational trier of fact to find, beyond a reasonable doubt, that one defendant was knowingly in ac-

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tual possession of more than 28 grams of cocaine and that one other defendant was a party to the crime. *Green v. State*, 187 Ga. App. 373, 370 S.E.2d 348, cert. denied, 187 Ga. App. 907, 370 S.E.2d 348 (1988).

Evidence was sufficient that defendant was in "possession" of cocaine where defendant was seen by law enforcement officers holding a grocery sack, which was later found to contain over \$5,000 in cash, where cocaine with a street value of over \$400 was found in the kitchen garbage basket, and where defendant was the only person in the kitchen at the time the police entered the apartment. *Owens v. State*, 192 Ga. App. 335, 384 S.E.2d 920 (1989).

When the defendant was seen sitting on the living room sofa, under which were found defendant's keys and a large stash of cocaine, where \$423 in cash was found in the defendant's front pocket, where that cocaine was found hidden in the defendant's bedroom closet, where cocaine was found carefully hidden in the defendant's and the codefendant's bathroom, and where a matchbox containing 12 pieces of "crack" or "rock" cocaine was found in the "breast pocket" of the codefendant's jacket and that a plastic bag containing 43 pieces of "rock" or "crack" cocaine was found on the living room sofa next to the codefendant's jacket, this evidence was sufficient to enable a rational trier of fact to reasonably find that the defendants were in "actual possession" of the more than 28 grams of pure cocaine. *Owens v. State*, 192 Ga. App. 335, 384 S.E.2d 920 (1989) (decided prior to 1988 amendment).

Defendants' convictions for trafficking in cocaine were vacated, and their cases remanded with direction that a conviction and sentence be entered for both defendants for possession of cocaine, where there was not sufficient evidence for a rational trier of fact to conclude, beyond a reasonable doubt, that defendants possessed at least 28 grams of pure cocaine, but the circumstantial evidence was sufficient to enable a rational trier of fact to conclude, beyond a reasonable doubt, that defendant had constructive possession of

the cocaine seized from the adjacent building. *Byers v. State*, 204 Ga. App. 552, 420 S.E.2d 23 (1992), cert. denied, 507 U.S. 928, 113 S. Ct. 1305, 122 L. Ed. 2d 694 (1993).

Defendants were observed purchasing several small objects from a codefendant in what the detectives believed to be a drug transaction and when defendants were pulled over a short time later, the arresting officer saw a napkin, which contained several pieces of crack cocaine fall out of the car. This evidence was sufficient to enable a rational trier of fact to find defendants guilty of possession of cocaine beyond a reasonable doubt. *Byers v. State*, 212 Ga. App. 110, 441 S.E.2d 290 (1994).

After the defendant was found seated near a bag containing a large quantity of cocaine, had within reach two loaded guns and access to ammunition, was monitoring police traffic using a scanner, and had more drugs and large amounts of money stashed in various places, the jury was authorized to conclude that the defendant was in knowing, constructive possession of over 28 grams of cocaine. *Cobb v. State*, 236 Ga. App. 265, 511 S.E.2d 522 (1999).

Although the superior court erred in admitting hearsay, by allowing the investigating officers to testify that the officers initiated their investigation on the basis of an anonymous tip alleging drug activity in defendant's home, such error was harmless in view of defendant's consent to the investigators' search, direct evidence of defendant's possession of marijuana, and strong circumstantial evidence showing defendant was in possession of cocaine. *Carlisle v. State*, 242 Ga. App. 253, 529 S.E.2d 385 (2000).

Appellate court upheld the defendant's convictions for possession of cocaine, sale of cocaine, and possession of cocaine with intent to distribute, based on sufficient evidence consisting of testimony from two special agents identifying the defendant, a videotape of a cocaine sale, and positive test results confirming the substance the defendant sold and possessed was cocaine. *Henley v. State*, 281 Ga. App. 242, 635 S.E.2d 856 (2006).

Based on: (1) the evidence presented to the jury about the condition and location of two bags of cocaine found in the grass

near a vehicle after the vehicle rolled over with the defendant inside was sufficient to allow the jury to infer that the bags were thrown out of the vehicle along with the other items; (2) items thrown from inside the car were traced back to the defendant and a passenger as the only occupants of the vehicle; and (3) receipts found in the vehicle, the jury could infer that the defendant had been in Maryland on one day, in Texas two days thereafter, and in Georgia on the day after that, and that this pattern indicated that defendant was knowingly engaged in delivering cocaine, sufficient circumstantial evidence existed to support the defendant's possession and trafficking cocaine convictions. *Davis v. State*, 285 Ga. App. 315, 645 S.E.2d 753 (2007).

There was sufficient evidence of possession to support a defendant's convictions of trafficking in cocaine, possession of cocaine with the intent to distribute, possession of marijuana, and possession of a firearm during the commission of a crime since: the defendant sped off when police tried to stop the defendant for running a stop sign; narcotics and a gun were found in the passenger side of the car; the passenger's story that the passenger had flagged down the defendant for a ride and that the passenger was unaware of the drugs and the gun was corroborated by the passenger's girlfriend; the defendant's sister, who owned the car, testified that there was no contraband in the car before the defendant took the car; the defendant had \$1,755 in cash on the defendant's person; and the defendant had prior drug offenses. *Jackson v. State*, 284 Ga. App. 619, 644 S.E.2d 491 (2007), cert. denied, No. S07C1169, 2007 Ga. LEXIS 521 (Ga. 2007).

Defendant's convictions for possessing 28 grams or more of cocaine, possessing cocaine with intent to distribute, and possession of a firearm during the commission of a felony were upheld on appeal as sufficient evidence was presented via the direct testimony of the defendant's live-in girlfriend, which when combined with the evidence showing their joint constructive possession of the drugs and gun tended to connect and identify the defendant with the crimes charged. *Allen v. State*, 286 Ga.

App. 469, 649 S.E.2d 583 (2007).

Conspiracy to traffic in drugs. — State put forth sufficient evidence to convict the defendant of conspiracy to traffic in cocaine after the state established, through the defendant's confession, that the defendant arranged the purchase of 28 grams or more of cocaine; the state was not required under O.C.G.A. § 16-13-31(a)(1) to prove the purity of the cocaine. *Gumbs v. State*, 258 Ga. App. 230, 573 S.E.2d 485 (2002).

Evidence sufficient for attempt to traffic. — In an attempt to traffic in cocaine case under O.C.G.A. §§ 16-4-1 and 16-13-31, the defendant was not entitled to a directed verdict of acquittal because the state did not prove the purity of the cocaine that the defendant intended to purchase; proof of purity was unnecessary given that all that was needed was a substantial step towards the crime of trafficking, not completion of the crime. *Davis v. State*, 281 Ga. App. 855, 637 S.E.2d 431 (2006), cert. denied, 2007 Ga. LEXIS 151 (Ga. 2007).

Evidence was sufficient to support a conviction of attempted trafficking in marijuana. A codefendant's testimony at the codefendant's trial and the codefendant's statement to the police were admissible as prior inconsistent statements and constituted substantive evidence of the defendant's participation in the attempted drug trafficking; furthermore, the codefendant's statements were sufficiently corroborated under O.C.G.A. § 24-4-8 by the testimony of a case agent that a loaded pistol was found at the defendant's feet and that a bag containing the currency used in the drug transaction was found within arm's reach of the defendant. *Green v. State*, 298 Ga. App. 17, 679 S.E.2d 348 (2009).

Evidence sufficient to support conviction for cocaine trafficking. — See *Wilson v. State*, 179 Ga. App. 780, 347 S.E.2d 709 (1986); *Rodriguez v. State*, 180 Ga. App. 272, 349 S.E.2d 22 (1986); *Feblez v. State*, 181 Ga. App. 567, 353 S.E.2d 64 (1987); *Kelly v. State*, 181 Ga. App. 605, 353 S.E.2d 92 (1987); *Lopez v. State*, 184 Ga. App. 31, 360 S.E.2d 722 (1987); *Thomas v. State*, 184 Ga. App. 318, 361 S.E.2d 280 (1987); *Reed v. State*, 186 Ga. App.

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539, 367 S.E.2d 809 (1988); Means v. State, 188 Ga. App. 210, 372 S.E.2d 484 (1988); Burroughs v. State, 190 Ga. App. 467, 379 S.E.2d 175 (1989); Ward v. State, 193 Ga. App. 137, 387 S.E.2d 150 (1989); Kelly v. State, 193 Ga. App. 549, 388 S.E.2d 377 (1989); Beauchene v. State, 194 Ga. App. 222, 390 S.E.2d 116 (1990); Mitchell v. State, 195 Ga. App. 255, 393 S.E.2d 274 (1990); Tatum v. State, 195 Ga. App. 349, 393 S.E.2d 494 (1990); Ross v. State, 206 Ga. App. 1, 424 S.E.2d 308 (1992); Daniels v. State, 221 Ga. App. 476, 471 S.E.2d 560 (1996); White v. State, 225 Ga. App. 74, 483 S.E.2d 329 (1997); Covington v. State, 226 Ga. App. 484, 486 S.E.2d 706 (1997); Brown v. State, 229 Ga. App. 87, 493 S.E.2d 230 (1997); McCoy v. State, 231 Ga. App. 703, 500 S.E.2d 611 (1998); Milton v. State, 232 Ga. App. 672, 503 S.E.2d 566 (1998); Smith v. State, 237 Ga. App. 616, 516 S.E.2d 319 (1999); Gurr v. State, 238 Ga. App. 1, 516 S.E.2d 553 (1999); Gurr v. State, 238 Ga. App. 1, 516 S.E.2d 553 (1999); Straite v. State, 238 Ga. App. 420, 518 S.E.2d 914 (1999); Small v. State, 243 Ga. App. 678, 534 S.E.2d 139 (2000); Brown v. State, 244 Ga. App. 440, 535 S.E.2d 785 (2000); Montgomery v. State, 249 Ga. App. 777, 549 S.E.2d 463 (2001).

When the defendant was convicted of the offense of trafficking in cocaine, and at trial, the state's expert witness had testified that the cocaine seized from the defendant's possession weighed 28.0 grams, and on cross-examination had stated that the electronic balance scales on which the cocaine was weighed has a margin of error of less than one percent, the trial court did not err in denying defendant's motion for directed verdict because even if the jury could reasonably find that the cocaine seized from the defendant was slightly less than the requisite 28 grams, it could just have reasonably have found that the weight measurement was accurate or that the amount of cocaine seized slightly exceeded 28 grams. Newton v. State, 191 Ga. App. 664, 382 S.E.2d 432 (1989).

When defendant was chased by a detective to the vicinity of an abandoned house where defendant was seen throwing some-

thing under the front porch by another police officer and a mailman, and when a bag was immediately retrieved from that location containing marijuana, rolling papers and a bottle of cocaine, the evidence presented at trial was sufficient to support a guilty verdict of trafficking in cocaine. Hall v. State, 192 Ga. App. 151, 384 S.E.2d 428 (1989).

When more than 28 grams of pure cocaine was found in the defendants' apartment, where some of the cocaine was found in plain view, and where some of the illegal drug was found hastily stashed in and under household furnishings and some of the cocaine was found carefully hidden in various spots throughout the apartment, this evidence was sufficient to support a finding that someone was involved in trafficking in cocaine. Owens v. State, 192 Ga. App. 335, 384 S.E.2d 920 (1989).

Evidence sufficient for conviction of trafficking in cocaine as "party thereto." Williams v. State, 199 Ga. App. 566, 405 S.E.2d 716 (1991).

When testimony from three troopers revealed that one package of contraband was taken from each of three passengers occupying a car, the packages were identified at trial as Exhibits 1, 2, and 3, and one of the troopers stated unequivocally on direct examination that the package of cocaine identified as Exhibit 2 was the one the trooper took from defendant, and the state's expert established that each package met the requisite weight and purity under O.C.G.A. § 16-13-31, the evidence was sufficient for a rational trier of fact to find defendant guilty of trafficking in cocaine beyond a reasonable doubt. Volcey v. State, 300 Ga. App. 881, 410 S.E.2d 36 (1991).

When the total weight of the mixture equalled almost three times the amount required for the conviction and the chemist testified that the chemist tested bags containing over half of the mixture there was ample evidence from which a rational trier of fact could have found defendant guilty of trafficking in cocaine. Hancock v. State, 212 Ga. App. 78, 441 S.E.2d 261 (1994).

When the state tendered cocaine evidence in three exhibits, only one of which

had been analyzed for purity, proof that one of the packages contained over 400 grams of cocaine, consisting of more than 10 percent purity was sufficient to support a conviction for trafficking. *Edwards v. State*, 219 Ga. App. 239, 464 S.E.2d 851 (1995).

Evidence was sufficient to establish that defendant was the person named in the indictment and to establish that defendant was guilty of cocaine trafficking beyond a reasonable doubt. *Robinson v. State*, 231 Ga. App. 368, 498 S.E.2d 579 (1998).

Evidence was sufficient where the cocaine was found in plain view of defendant in the lap of the front-seat passenger of the car defendant was driving, scales were found in the car, and there was testimony from an accomplice. *Knight v. State*, 242 Ga. App. 363, 528 S.E.2d 855 (2000).

Juvenile's possession of 38.7 grams of cocaine was sufficient to sustain delinquency adjudication for trafficking in cocaine under O.C.G.A. § 16-13-31(a)(1). *In re R.S.*, 253 Ga. App. 409, 559 S.E.2d 143 (2002).

Evidence that the defendant's companion showed a bag of cocaine to an undercover officer while the defendant stood nearby in a manner the officer described as a "show of force," and that the companion's car contained another 16 ounces of cocaine, was sufficient for a jury to find that the defendant was guilty beyond a reasonable doubt of trafficking in cocaine as either a principal in the transaction or as a party to the crime. *Martinez v. State*, 259 Ga. App. 402, 577 S.E.2d 82 (2003).

Evidence was sufficient to authorize the jury's finding that the defendant was in joint constructive possession of the cocaine, marijuana, and pistol found inside the driver's car because the drugs were in plain view inside a car that smelled of raw marijuana, the defendant was nervous about the impending search and gave evasive answers to the officers, the defendant was in possession of an unusually large amount of cash and was in a position to see the pistol when the driver took the driver's proof of insurance from the glove box, and, given the trafficking amount of cocaine found, the jury was authorized to infer that the driver and the defendant

possessed a loaded handgun to protect their illegal drug trade; thus, the evidence was sufficient to support the jury's finding that the defendant was guilty of trafficking in cocaine, possession of marijuana, and possession of a firearm during the commission of a crime. *Lopez v. State*, 259 Ga. App. 720, 578 S.E.2d 304 (2003).

When the defendant: (1) signed for two boxes containing approximately 82 pounds of marijuana using two different aliases; (2) claimed ignorance as to the contents of the boxes but admitted to police that the plan was to deliver the boxes to another person in a public restroom and then to accept payment of \$200 per box at yet another location; and (3) gave conflicting stories before and during trial as to defendant's belief regarding the contents of the boxes, such evidence supported the defendant's conviction of trafficking in more than 50 pounds of marijuana in violation of O.C.G.A. § 16-13-31(c), especially since the "deliberate ignorance" doctrine applied. *Perez-Castillo v. State*, 257 Ga. App. 633, 572 S.E.2d 657 (2002).

Trial court did not err in denying the defendant's motion for a directed verdict as the evidence was legally sufficient to support defendant's conviction for trafficking in cocaine; evidence showed that the one bag that the state tested was positive for cocaine, the state was not required to test the other two bags containing a similar-looking substance, the three bags together contained more than 28 grams of cocaine with a purity of 10 percent, and no evidence indicated the defendant was making personal use of that amount of cocaine. *Pitts v. State*, 260 Ga. App. 553, 580 S.E.2d 618 (2003).

Evidence that defendant agreed to sell drugs to an informant was sufficient to sustain defendant's conviction for cocaine trafficking. *Carter v. State*, 261 Ga. App. 204, 583 S.E.2d 126 (2003).

When the drug expert testified to performing a random analysis on the 200 grams of cocaine, tested approximately 40.8 grams, and found that the sample was 93 percent pure cocaine, defendant's conviction of trafficking in cocaine in violation of O.C.G.A. § 16-13-31(a) was affirmed because the expert's opinion was

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sufficient to support the jury's verdict on the drug trafficking charge. *Castillo v. State*, 263 Ga. App. 772, 589 S.E.2d 325 (2003).

There was sufficient evidence to show that the defendant possessed cocaine when the defendant resided in the bedroom where the cocaine was discovered, a friend testified that the friend heard the defendant admit the cocaine was found in the defendant's room, the defendant's mother pointed out the room as defendant's, and after the cocaine was discovered, the defendant went into hiding, and the argument of equal access by the defendant's mother and brother to the cocaine was unavailing since other evidence linked the defendant to the cocaine. *Truitt v. State*, 266 Ga. App. 56, 596 S.E.2d 219 (2004).

Evidence was sufficient to support defendant's conviction for trafficking in cocaine since: (1) a confidential informant made a controlled buy from defendant; (2) defendant offered to provide the name of a major drug dealer if defendant were set free; (3) a person who was with defendant at the time of defendant's arrest stated that defendant had taken the person to the defendant's residence to pick up cocaine; (4) officers executing a search warrant at defendant's residence found a lockbox filled with scales and cocaine; and (5) defendant's equal access defense was rejected. *Johnson v. State*, 267 Ga. App. 549, 600 S.E.2d 667 (2004).

Defendant's motion for a directed verdict of acquittal was properly denied and the evidence supported the defendant's conviction for trafficking in cocaine in violation of O.C.G.A. § 16-13-31(a)(1) as the defendant arranged the drug transaction with an undercover officer, accepted the container in which the officer directed the defendant to place the cocaine, and delivered to the officer 397 grams of cocaine with a purity of 44 percent. *Salgado v. State*, 268 Ga. App. 18, 601 S.E.2d 417 (2004).

Evidence was sufficient to convict the defendant of cocaine trafficking and possession of cocaine with intent to distribute because there was more evidence than the

defendant's mere presence in the apartment, which was actually rented by the defendant's sister, that linked the defendant to the cocaine: (1) the jury could infer that the defendant actually lived in the apartment because the defendant claimed ownership of a television and a video game in the apartment; (2) it was a one-bedroom apartment to which the defendant had a key; (3) the defendant was sleeping in the bedroom when the police arrived; (4) the defendant's own statements provided additional evidence demonstrating the defendant's possession of the cocaine hidden in the kitchen cabinets; and (5) the defendant had a lot of cash on the defendant's person with large numbers of denominations that was typically used to purchase drugs. *Ballard v. State*, 268 Ga. App. 55, 601 S.E.2d 434 (2004).

Evidence that an undercover police officer tried to purchase drugs from a third person, that the third person would have to get the drugs from "his source," and that the officer was present when the defendant gave a package to a third person shortly before the third person delivered cocaine to the officer was sufficient to sustain the defendant's convictions for trafficking in cocaine and possessing cocaine with intent to distribute. *Serrate v. State*, 268 Ga. App. 276, 601 S.E.2d 766 (2004).

When, upon executing a search warrant for the defendant's house, four kilograms of cocaine were found in the house and a fifth kilogram was found in the defendant's car parked at the house, the evidence was sufficient to support the defendant's conviction for cocaine trafficking. *Solis v. State*, 268 Ga. App. 493, 602 S.E.2d 166 (2004).

Convictions for trafficking in cocaine and possession of marijuana with intent to distribute were supported by sufficient evidence which showed that the defendant was the sole lessee and resident of an apartment where nearly 500 grams of cocaine were found, along with several bags of marijuana packaged for resale, and that the defendant had recently sold cocaine, which came from a blue bag holding 111 grams of cocaine, which was also found in the apartment. *Vance v. State*, 268 Ga. App. 556, 602 S.E.2d 276 (2004).

Witness's testimony established that the defendant sold cocaine to the victim, later struggled with the victim and the victim was shot, and the defendant threatened the witness not to tell the police; the evidence was sufficient to find the defendant guilty of violating the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., and of concealing a death under O.C.G.A. § 16-13-1. *Jackson v. State*, 271 Ga. App. 278, 609 S.E.2d 207 (2005).

State's admission of proof that over 28 grams of cocaine of at least ten percent purity was found in an envelope box on the floor of the car that the defendant was driving was sufficient to support the defendant's conviction for cocaine trafficking. *Kates v. State*, 271 Ga. App. 326, 609 S.E.2d 710 (2005).

As the defendant was seen in actual possession of a shoebox containing 241 grams of cocaine, which the defendant disposed of in a dumpster, there was sufficient evidence to support the jury's guilty verdict. *Hubbard v. State*, 274 Ga. App. 184, 617 S.E.2d 167 (2005).

Sufficient evidence supported the conviction of the defendant for trafficking cocaine under O.C.G.A. § 16-13-31(a)(1); during a police search of the defendant's motel room, to which the defendant consented, police discovered that a safe key on the defendant's person opened a safe that contained 58.1 grams of cocaine. *Nelson v. State*, 274 Ga. App. 585, 618 S.E.2d 192 (2005).

Because a videotape of a cocaine sale provided independent evidence of the defendant's participation in the transaction, the evidence was sufficient to support the defendant's conviction for selling cocaine. *McKinney v. State*, 274 Ga. App. 859, 619 S.E.2d 367 (2005).

Evidence was sufficient to show that the defendants knowingly possessed cocaine as was required to support the defendants' convictions under O.C.G.A. § 16-13-31(a)(1)(C) for trafficking in cocaine; the defendants' criminal intention was shown by the fact that when stopped by a police officer for a traffic offense and a seat belt violation, the defendants' stories contradicted each other, the defendants' car smelled of air freshener, the defendants could not explain who owned

the car nor produce a vehicle registration for the vehicle that the defendants were traveling in, and related circumstances from which a jury could infer that the defendants knew about the large quantity of cocaine that was hidden in a secret compartment in the defendants' car, despite the defendants' claims that the the defendants did not know about the cocaine. *Fernandez v. State*, 275 Ga. App. 151, 619 S.E.2d 821 (2005).

Evidence was sufficient to support defendant's conviction for trafficking in cocaine because: (1) the defendant rented and furnished an apartment for the codefendant, who defendant described as a casual friend; (2) the defendant paid for a cell phone used by the codefendant; and (3) a kilogram of cocaine and over \$98,000.00 was found in the apartment; however, the conviction was reversed on other grounds. *Patten v. State*, 275 Ga. App. 574, 621 S.E.2d 550 (2005).

Evidence did support a conviction for trafficking in cocaine; even if corroboration of a confidential informant's testimony was necessary, the informant's testimony was sufficiently corroborated by the testimony of a police officer and an agent with the Drug Enforcement Agency. *Moss v. State*, 278 Ga. App. 362, 629 S.E.2d 5 (2006).

Defendant's conviction for cocaine trafficking was upheld on appeal as the evidence showed that an excess of twenty-eight grams of cocaine, with a purity of over 10 percent, was found in plain view in a car that the defendant was driving, directly in front of the defendant and the defendant was the only person in the car. *Johnson v. State*, 279 Ga. App. 98, 630 S.E.2d 612 (2006).

Sufficient evidence supported the defendant's conviction of trafficking in cocaine in violation of O.C.G.A. § 16-13-31 and violating the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq.; the defendant was found alone in a bathroom in which the toilet contained 90 grams of cocaine and a large amount of cash, and a key to a car, which was later found to contain marijuana, was found in the defendant's pants. *Jackson v. State*, 281 Ga. App. 83, 635 S.E.2d 372 (2006).

Defendant's conviction for trafficking in cocaine was supported by sufficient evi-

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dence that officers found more than 43 grams of cocaine under the hood of the vehicle the defendant was driving after a drug dog alerted that contraband was located inside the vehicle and a subsequent search based on the alert. *Garvin v. State*, 283 Ga. App. 242, 641 S.E.2d 176 (2006).

Because: (1) the defendant failed to sufficiently prove an entrapment defense, and hence, the need for disclosure of an informant's identity; (2) no error resulted in refusing to strike a juror for cause; and (3) the trial court's entrapment instruction was legally correct and did not mislead the jury, the defendant's convictions for trafficking in cocaine, in violation of O.C.G.A. § 16-13-31(a), possession of cocaine with intent to distribute, contrary to O.C.G.A. § 16-13-30(b), and two counts of use of communication facilities in committing a felony drug offense, under O.C.G.A. § 16-13-32.3, were affirmed on appeal. *Griffiths v. State*, 283 Ga. App. 176, 641 S.E.2d 169 (2006).

Sufficient evidence supported the defendant's convictions of trafficking in cocaine, possession of marijuana with intent to distribute, and possession of cocaine with intent to distribute within 1,000 feet of a school, despite an argument on appeal that no evidence of either actual or constructive possession was presented as: (1) sufficient additional evidence, albeit circumstantial, tied the defendant to those crimes and established more than the defendant's mere presence to the drugs seized; and (2) the proved facts excluded any reasonable hypotheses that a crime could have been committed by anyone else. *Slaughter v. State*, 282 Ga. App. 276, 638 S.E.2d 417 (2006).

Evidence was sufficient to convict the defendant of trafficking in cocaine when in addition to the defendant's fingerprint on a laundry detergent box of cocaine, the jury was entitled to infer from tape recorded conversations between a codefendant and an informant that the defendant was the supplier of the cocaine that was to be delivered to the informant; the day after the codefendant notified the informant that the supplier had arrived, the

codefendant and the defendant showed up at the informant's house, and the defendant was with the codefendant when the codefendant turned to avoid a roadblock and when the laundry detergent box was left in the woods. *Maldonado v. State*, 284 Ga. App. 26, 643 S.E.2d 316 (2007).

Evidence was sufficient to find that the defendant was guilty beyond a reasonable doubt of trafficking in cocaine where cocaine was found in a vehicle in which the defendant was a passenger, the defendant had \$1,780 in the defendant's pockets, and the defendant was accompanied by the defendant's brother, who had a history of possessing cocaine with the intent to distribute. *McKenzie v. State*, 283 Ga. App. 555, 642 S.E.2d 187 (2007).

Sufficient evidence existed to support a defendant's conviction for cocaine trafficking and the subsequent denial of the defendant's motion for a new trial since the evidence showed, via testimony from the defendant's wife and the wife's two friends, that once the defendant found the cocaine in the house of a client the defendant was sent to retrieve the drug from, the defendant not only took possession of the cocaine but also used some of the drug as well. *Fraser v. State*, 283 Ga. App. 477, 642 S.E.2d 129 (2007).

There was sufficient evidence that the defendant was guilty of trafficking in cocaine in violation of O.C.G.A. § 16-13-31(a); in addition to evidence that 1,000 grams of cocaine (with a purity of 73 percent) was found in the apartment occupied by the defendant, the state produced evidence connecting the defendant to the cocaine by more than mere spatial proximity. *Taylor v. State*, 285 Ga. App. 697, 647 S.E.2d 381 (2007), cert. denied, 2007 Ga. LEXIS 655 (Ga. 2007).

Given sufficient evidence that: (1) the defendant was arrested after driving a car containing over 900 grams of cocaine, raising a presumption of both possession and control; (2) the link between the defendant and the cocaine was not based solely on the presumption of possession; (3) the defendant admitted to purchasing the shoes originally packaged in the box containing the cocaine, and was wearing those shoes; (4) a search of the defendant's person further revealed a large sum of

cash; and (5) the trial court considered the defendant's equal access theory but found that it did not demand a defense verdict, the defendant's cocaine trafficking conviction was upheld on appeal. *McGee v. State*, 287 Ga. App. 460, 651 S.E.2d 546 (2007), cert. denied, 2008 Ga. LEXIS 167 (Ga. 2008).

Given a police officer's testimony that the drugs found at the scene came from a bag which the defendant removed from a pants pocket, the jury was authorized to find that the defendant trafficked in cocaine, possessed cocaine with intent to distribute, and possessed less than one ounce of marijuana; moreover, the amount of cocaine at issue, as well as the defendant's possession of digital scales typically used to weigh drugs for distribution, permitted the jury to discount the defendant's own testimony and find an intention to distribute the drugs. *Lipsey v. State*, 287 Ga. App. 835, 652 S.E.2d 870 (2007).

Given that two officers testified that the officers saw the defendant, in plain view, packaging 35 grams of cocaine and 94 grams of marijuana into smaller packages, and the testimony of a single witness was generally sufficient to establish a fact, the defendant's convictions for trafficking in cocaine and possession of marijuana with the intent to distribute were upheld on appeal. *King v. State*, 289 Ga. App. 461, 657 S.E.2d 570 (2008).

Evidence was sufficient to support a defendant's conviction as a party to trafficking in cocaine since the evidence showed that the defendant was aware that an alleged drug dealer kept cocaine in the house where the defendant was arrested, that the dealer doled cocaine out to the defendant and others so that they could sell the cocaine, that the defendant had sold cocaine for the dealer in the past and had stated the intent to do so on the day the defendant was arrested, that cocaine found in the defendant's possession had the same packaging as cocaine found in the basement of the house, and that when the police arrived to execute a search warrant, the defendant attempted to destroy the cocaine the defendant had in the defendant's physical possession. *Riley v. State*, 292 Ga. App. 202, 663 S.E.2d 835 (2008).

Evidence was sufficient to find the defendant guilty beyond a reasonable doubt of trafficking in cocaine since the defendant was the only passenger in a hatchback and chose to sit in the rear of the vehicle with full access to the cargo area and the cocaine. The defendant volunteered in an interview that the defendant "just needed to make some money." *Oliveres v. State*, 292 Ga. App. 460, 664 S.E.2d 836 (2008), cert. denied, 2008 Ga. LEXIS 916 (Ga. 2008).

Evidence supported a defendant's conviction for trafficking in cocaine in violation of O.C.G.A. § 16-13-31(a)(1). The state was not required to prove an intent to distribute, and the determination of guilt or innocence depended largely on whether the jury believed the defendant, who claimed that some drugs were thrown into the defendant's lap and that the defendant panicked, picked the drugs up, and threw the drugs out of the window. *Hancock v. State*, 293 Ga. App. 595, 667 S.E.2d 437 (2008).

Evidence which included testimony from a defendant's codefendant that: (1) the defendant came to the codefendant's house; (2) the defendant showed the codefendant drugs; (3) the defendant indicated that the defendant needed help to move the drugs; and (4) the codefendant contacted the defendant and arranged a date and time for a drug transaction after a confidential informant (CI) told the codefendant that CI had an associate in need of one to four kilos of cocaine was sufficient to support the defendant's conviction on a trafficking in cocaine charge. *Jones v. State*, 294 Ga. App. 854, 670 S.E.2d 506 (2008).

There was sufficient evidence to support a defendant's conviction for trafficking in cocaine based on the evidence showing more than mere proximity to the cocaine in that the defendant was alone in the hotel room when the defendant heard the knock on the door; no one entered or exited the room prior to the search; paraphernalia commonly used to prepare crack cocaine was openly displayed on the counter; and the jacket in which the cocaine was found was the same jacket the defendant wore during a prior arrest that had been videotaped at which time the

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defendant was also found to have possessed cocaine. *Celestin v. State*, 296 Ga. App. 727, 675 S.E.2d 480 (2009), cert. denied, No. S09C1200, 2009 Ga. LEXIS 340 (Ga. 2009).

With regard to a defendant's convictions for possession of marijuana with the intent to distribute, trafficking in 4-Methylenedioxymethamphetamine, commonly known as ecstasy, trafficking in cocaine, and possession of a firearm during the commission of a crime, there was sufficient evidence to support the defendant's conviction for possession of the contraband, which was found in a backpack, based on the strong odor of marijuana coming from the vehicle in which the defendant was a passenger, the defendant's suspicious and nervous behavior, the defendant's joint living arrangement with two other defendants, the defendant's possession of ammunition for another one of the defendant's weapons, and the fact that the defendant was, at times, within arm's reach of the backpack, which showed an intent and power to exercise joint control over the backpack and the drugs found therein; likewise, there was sufficient evidence to support the trafficking charges based on the amounts of the contraband found; and, there was sufficient evidence to support the firearm possession charge since the defendant was found in possession of a magazine that fit the gun located within arm's reach. However, considering that there were four people in the vehicle, the court found that the state's evidence was insufficient to exclude the reasonable hypothesis that the marijuana was intended for personal use, therefore, the conviction for the intent to distribute marijuana was reduced to possession. *Vines v. State*, 296 Ga. App. 543, 675 S.E.2d 260 (2009).

Trial court properly denied a defendant's motion for a directed verdict as there was sufficient evidence to support the defendant's conviction for trafficking in cocaine based on the observations of the police watching the defendant and codefendants engaging in suspicious behavior in a high-crime area; the contents of the backpack, which contained 377.45 grams

of 50.7 percent pure cocaine heavily wrapped in saran wrap, with a street value between \$8,000 and \$10,000 in powder form or as much as \$15,000 if cut with an agent and compressed into rocks of crack cocaine; the drugs found in the trunk of the defendant's rental vehicle; and the rental of a motel room by the defendant. *Mosley v. State*, 296 Ga. App. 746, 675 S.E.2d 607 (2009), cert. denied, No. S09C1188, 2009 Ga. LEXIS 322 (Ga. 2009).

Evidence was sufficient to convict a defendant on a trafficking in cocaine charge as a large amount of cash was found on the defendant's person, the defendant tried to flee once a drug dog alerted to the area of a van in which the defendant was sitting, and a shopping bag containing cocaine was observed by the defendant's foot. *Singleton v. State*, 297 Ga. App. 452, 677 S.E.2d 348 (2009).

Sufficient evidence existed to convict a defendant of trafficking in cocaine under O.C.G.A. § 16-13-31(a)(1) because a search warrant of defendant's residence revealed, inter alia, large amounts of cocaine and cash and several persons approached the residence while the officers were there to execute the warrant and sought to purchase drugs. *Weems v. State*, 295 Ga. App. 680, 673 S.E.2d 50 (2009).

While a defendant claimed that the evidence was insufficient to exclude the possibility that the cocaine belonged solely to the defendant's passenger, the testimony of the passenger that the passenger dropped the drugs out of the truck after the defendant threw the drugs in the passenger's lap was adequately corroborated under O.C.G.A. § 24-4-8 by the facts that the defendant had more than \$2,000 in the defendant's pocket and that the defendant was the owner and driver of the truck from which the drugs were thrown; the defendant was, thus, properly convicted of trafficking in cocaine under O.C.G.A. § 16-13-31(a)(1) and possession of cocaine as a lesser included offense of possession with intent to distribute. *Wingfield v. State*, 297 Ga. App. 476, 677 S.E.2d 704 (2009).

Evidence was sufficient to support the defendant's convictions for trafficking in cocaine, possession of a firearm during the

commission of a felony, possession of a firearm by a convicted felon, and felony fleeing or attempting to elude based on the defendant's involvement in a police chase that included speeds in excess of 100 m.p.h. in a residential area and the defendant's attempt to flee on foot; a backpack that the defendant was carrying while running from the police and which was recovered from the roof of the house around which the defendant had disappeared had drugs and a pistol in the backpack. *Hinton v. State*, 297 Ga. App. 565, 677 S.E.2d 752 (2009).

Evidence, although circumstantial, was sufficient to connect the defendant to the house where drugs were found; thus, it was sufficient to support convictions of trafficking in cocaine and possession of marijuana with intent to distribute. Although others might have been present on the property on various unspecified occasions, the defendant was allowed by the owner to use the house, had been seen at the residence by police on previous occasions, had a vehicle on the premises, and hurriedly walked away from officers when the officers arrived; the evidence also showed that no other persons were present when officers executed the search warrant. *Clyde v. State*, 298 Ga. App. 283, 680 S.E.2d 146 (2009).

Evidence that the defendant was going in and out of the defendant's home, that an officer saw through the open front door the codefendant sitting near a large slab of cocaine, and that a small amount of cocaine was found on the defendant's person, allowed the jury to find that the defendant had the intent to exercise control over the slab of cocaine seen in plain view. Therefore, the evidence was sufficient to convict the defendant of trafficking in cocaine in violation of O.C.G.A. § 16-13-31(a)(1). *Reid v. State*, 298 Ga. App. 889, 681 S.E.2d 671 (2009).

Police officer testified about searching a patrol car before transporting the defendant in the car, and about the officer's suspicions that the defendant had stuffed something underneath the backseat because the officer saw debris on the back of the defendant's pants and on the backseat. This circumstantial evidence was sufficient under O.C.G.A. § 24-4-6 to

convict the defendant of possessing the cocaine found wedged underneath the backseat. *Simmons v. State*, 299 Ga. App. 21, 681 S.E.2d 712 (2009).

Evidence was sufficient to convict defendant of cocaine trafficking because the defendant arrived at a house under surveillance wearing a light-colored shirt and carrying a package. After police entered the house, an officer saw a man in a light-colored shirt drop a bag of cocaine out the window. No other person present had on a light-colored shirt; therefore, the jury could conclude that the defendant possessed the 490.22 grams of cocaine found in the bag. *Kimble v. State*, 301 Ga. App. 237, 687 S.E.2d 242 (2009).

Defendant's knowledge that the vehicle in which the defendant was riding had a hidden compartment containing \$130,000 in cash and a kilo of cocaine could be inferred from the circumstances including the defendant's claiming ownership of the car and the conflicting stories told by a codefendant and the defendant regarding their destination. *Feliciano v. State*, 302 Ga. App. 328, 690 S.E.2d 680 (2010).

Trial court did not err in denying the defendant's motion for a directed verdict after a jury found the defendant guilty of trafficking in cocaine, O.C.G.A. § 16-13-31(a)(1)(A), and possession of marijuana with intent to distribute, O.C.G.A. § 16-13-30(j), because the verdict was not insupportable as a matter of law; in addition to evidence that the defendant rented a hotel room where illegal drugs were found, had a key to the suite, and was going to the suite at a time when a great quantity and variety of drugs were in open view, there was other evidence linking the defendant to the contraband found there, including the defendant's suspicious behavior upon seeing officers near the suite and the presence of the defendant's personal property inside the suite. *Glass v. State*, 304 Ga. App. 414, 696 S.E.2d 140 (2010).

Defendant's accomplice's testimony that the defendant was knowingly in possession of cocaine found in their vehicle was corroborated by evidence of 575 grams of cocaine in the vehicle, that the defendant was extremely anxious when stopped by police, and the fact that there were 18 air

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fresheners hung throughout the vehicle, and was therefore sufficiently corroborated under O.C.G.A. § 24-4-8, supporting the defendant's conviction for trafficking in cocaine in violation of O.C.G.A. § 16-13-31(a)(1). *Richardson v. State*, 305 Ga. App. 850, 700 S.E.2d 738 (2010).

Evidence supported a defendant's conviction for trafficking in more than 400 grams of cocaine in violation of O.C.G.A. § 16-13-31(a)(1)(C) because the defendant directed that the cocaine package be cut open and tasted, provided a knife for this purpose, directed another man to get the money, and assisted in counting the money. A jury could conclude that the defendant had the power and intent to control the cocaine. *Phillips v. State*, 307 Ga. App. 366, 705 S.E.2d 287 (2010).

Evidence sufficient to support conviction for heroin trafficking. — Jury's finding that defendant was guilty of trafficking in heroin was authorized where officers found a plate containing over four grams of a mixture containing heroin, five loaded handguns, drug paraphernalia, items used in the business of trafficking heroin and over \$1,000 on the bed in the defendant's apartment, this evidence and evidence that these items were used in the business of selling heroin. *Hutchins v. State*, 204 Ga. App. 690, 420 S.E.2d 374 (1992).

Surveillance showing persons entering for approximately a minute prior to leaving, a controlled buy by a confidential and reliable informant, and the fact that the defendant had a set of keys which opened a black nylon bag found on the bed inside the bedroom that contained heroin, all provided sufficient evidence to convict the defendant of trafficking. *Ibekilo v. State*, 277 Ga. App. 384, 626 S.E.2d 592 (2006).

Evidence was sufficient to support the defendant's conviction for trafficking in heroin in violation of O.C.G.A. § 16-13-31(b)(3) because the expert witness from the state crime lab testified that the witness examined the substance contained in the corner tie that the defendant sold to the undercover officer as heroin, the witness took a representative sampling of different parts of the substance,

the witness subjected the samples to three separate tests, and the witness concluded that the substance contained heroin; whether the substance in the corner tie was a mixture containing heroin or merely a "look alike" substance was a question for the jury as was the weight to be given to the testimony of the state's expert from the crime lab. *Thomas v. State*, 306 Ga. App. 279, 701 S.E.2d 895 (2010).

Evidence sufficient for drug trafficking. — Defendant's conviction on conspiracy to traffic in cocaine was supported by the evidence as it showed that defendant conspired with others to knowingly possess 28 grams or more of cocaine and that defendant took the overt act of possessing the cocaine by picking it up from defendant's nephew, telling the driver of the vehicle to slow down in order to avoid arrest, and tried to conceal the cocaine under defendant's seat after being stopped for speeding. *Smith v. State*, 253 Ga. App. 131, 558 S.E.2d 455 (2001).

Evidence was sufficient to find the defendant guilty of trafficking in methamphetamine when the defendant drove to the meeting place, got out of the defendant's car and got into the passenger seat of the informant's car, and the defendant gave the informant the agreed upon amount of money, \$3200, half of the purchase price for the drugs. *Harris v. State*, 258 Ga. App. 669, 574 S.E.2d 871 (2002).

Evidence was sufficient to support the defendant's conviction for trafficking in methamphetamine since (1) the defendant was the owner of a vehicle in which drugs were found and was a passenger at the time the drugs were found; (2) the driver stated that the drugs did not belong to the driver; (3) the drugs were in plain view on the passenger side of the vehicle where the defendant was sitting; and (4) the defendant told the driver not to stop and fled the scene when approached by officers. The equal access rule did not apply since the defendant's possession of the vehicle was not the sole evidence of the defendant's guilt. *Kantorik v. State*, 257 Ga. App. 828, 572 S.E.2d 690 (2002).

Evidence was sufficient to support a drug trafficking charge because, inter alia, an officer observed a steady flow of

vehicle and pedestrian traffic around two residences, the officer explained that a suspected seller would enter the first home and then return to the second home to complete a sale, and after completing five or six sales, the suspected seller would return to the first home, the officer observed almost 20 of these transactions, and, in executing a search warrant, officers saw the defendant and the spouse leave a bathroom in one of the homes, and officers found cocaine in the pipes of the bathroom's toilet. *Blue v. State*, 275 Ga. App. 671, 621 S.E.2d 616 (2005).

Evidence supported a conviction for trafficking in amphetamine where a package was dropped from the defendant's truck containing amphetamine, the codefendant testified that the package was obtained from the defendant's aunt in exchange for money, and a police officer testified that an individual user would have had paraphernalia, less amphetamine, and more money than was found with the defendant and the codefendant; the state did not rely solely on the testimony of the codefendant, who was acquitted. *Steed v. State*, 273 Ga. App. 845, 616 S.E.2d 185 (2005).

There was sufficient evidence to support convictions for trafficking in cocaine and possession of a drug-related object, in violation of O.C.G.A. §§ 16-13-31(a)(1) and 16-13-32.2, against the defendant as the defendant's van contained items used as drug pipe filters, the defendant's passenger had dropped crack cocaine on the ground just prior to being apprehended, both individuals had large amounts of cash on them, and the defendant had a criminal history of similar drug-related conduct. *Holloway v. State*, 297 Ga. App. 81, 676 S.E.2d 445 (2009).

Because probation officers were authorized to investigate an allegation that defendant's son possessed drugs in violation of the son's probation, and because the officers were authorized to seize contraband falling in plain view, the evidence was sufficient to sustain defendant's convictions for possession of methamphetamine with intent to distribute and trafficking in methamphetamine under O.C.G.A. §§ 16-13-30(b) and 16-13-31(e)(1). *Prince v. State*, 299 Ga. App. 164, 682 S.E.2d 180 (2009).

Trial court did not err in convicting the defendant of trafficking in methamphetamine because the evidence sufficed to sustain the conviction, and the jury was authorized to conclude that the circumstances excluded the hypothesis that another passenger had placed drugs in the bed of the truck; the passenger testified at trial that the passenger did not place the drugs in the truck bed, and a police officer testified that the passenger, whom the officer had in sight the entire time, never came within five-to-six feet of the truck and that the officer not only saw the defendant place the defendant's arm in the truck bed but heard an accompanying thump. *Haggard v. State*, 302 Ga. App. 502, 690 S.E.2d 651 (2010).

Evidence that a defendant showed officers a can in the defendant's kitchen cupboard with a false bottom that concealed 33.18 grams of cocaine and 19.8 grams of marijuana was sufficient to support the defendant's convictions for trafficking in cocaine and possession of marijuana in violation of O.C.G.A. §§ 16-13-30(j)(1) and 16-13-31(a)(1)(A). The jury was charged on equal access and clearly rejected the defendant's defense that a confidential informant working as a handyman at the defendant's home could have placed the drugs there. *Daniel v. State*, 306 Ga. App. 48, 701 S.E.2d 499 (2010).

There was sufficient evidence to support convictions for trafficking in cocaine and possession of tools for the commission of a crime, O.C.G.A. §§ 16-7-20 and 16-13-31, when narcotics and an electronic scale were found in the defendant's residence, and although the defendant did not own the residence, the defendant resided there for the previous five years and there was a lack of evidence at the home of any other persons residing therein. Further, the items were well hidden within the premises, the defendant used a closed circuit surveillance system to monitor the home, and the defendant possessed a substantial amount of cash at the time of the search. *Brown v. State*, 307 Ga. App. 99, 704 S.E.2d 227 (2010).

Evidence sufficient to support conviction for trafficking in marijuana. — Defendant's conviction for trafficking in marijuana, in violation of O.C.G.A.

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§ 16-13-31(c), was sufficiently supported by the evidence because, although only one ounce of two plastic bags in the defendant's vehicle was tested, the state's expert testified that the remainder of the bags' contents were similar to the test sample; the opinion of the state's expert that the remainder of the bags contained marijuana was sufficient to uphold the defendant's conviction. *Smith v. State*, 289 Ga. App. 236, 656 S.E.2d 574 (2008).

Evidence sufficient to support conviction of selling cocaine. — See *Dixon v. State*, 177 Ga. App. 506, 339 S.E.2d 775 (1986); *Hamilton v. State*, 180 Ga. App. 284, 349 S.E.2d 230 (1986); *Wilson v. State*, 193 Ga. App. 183, 387 S.E.2d 413 (1989); *Roberson v. State*, 195 Ga. App. 379, 393 S.E.2d 516 (1990); *Ross v. State*, 206 Ga. App. 1, 424 S.E.2d 308 (1992).

Accomplice's testimony combined with a videotape of defendant in the front seat of a car while talking to a confidential police informant during a drug buy was sufficient corroboration to justify defendant's convictions for selling cocaine. *Etchison v. State*, 266 Ga. App. 528, 597 S.E.2d 583 (2004).

Despite a sufficiency of the evidence challenge based solely on an issue of the identity of the defendant as the perpetrator, the defendant's conviction for the sale of cocaine was affirmed on appeal because the issue surrounding the credibility of the witness making such identification was for the jury, and not the Court of Appeals of Georgia, to determine, while resolving any inconsistencies in the testimony presented for or against the guilt of the accused. *Cosby v. State*, 289 Ga. App. 36, 656 S.E.2d 186 (2007).

State's uncontradicted evidence showed that the idea to sell cocaine to an informant originated with the defendant, and the defendant was predisposed to commit the crime without any undue persuasion, incitement, or deceit by the state, and therefore supported the defendant's conviction for the sale of cocaine and the trial court's refusal to charge the jury on the defense of entrapment. *Lightsey v. State*, 289 Ga. App. 181, 656 S.E.2d 852 (2008).

Sufficient evidence was presented to

sustain the defendant's conviction for selling cocaine because unrefuted testimony from an undercover agent identifying the defendant as the seller of the cocaine purchased in a controlled buy conducted by the agent was corroborated by an audio tape and the testimony of other officers at the scene. *Thompson v. State*, 289 Ga. App. 387, 657 S.E.2d 296 (2008).

Evidence held sufficient to support sale of methamphetamine charge. — Conviction for the sale of methamphetamine was upheld on appeal because the state presented sufficient evidence to support a charge of the sale of methamphetamine before the defendant moved for a directed verdict of acquittal, specifically, that the drugs allegedly sold to an informant were packaged in the same type of Ziploc bag as those found on the defendant's person, and the defendant was in possession of a large amount of cash and paraphernalia. *Ramey v. State*, 288 Ga. App. 800, 655 S.E.2d 675 (2007).

Evidence sufficient to support conviction of possession of methamphetamine. — As the defendant was the driver, owner, and sole occupant of a vehicle, and 250 grams of methamphetamine were found hidden beneath the steering column, within arm's reach of the driver, the circumstantial evidence was sufficient to establish the defendant's "knowing" possession of the drugs as required by O.C.G.A. § 16-13-31(e). *Garcia v. State*, 293 Ga. App. 422, 667 S.E.2d 205 (2008).

Evidence sufficient for conviction of trafficking and possession of controlled substances. — See *Clark v. State*, 184 Ga. App. 380, 361 S.E.2d 682, cert. denied, 184 Ga. App. 909, 361 S.E.2d 682 (1987); *Rice v. State*, 224 Ga. App. 725, 481 S.E.2d 839 (1997).

Evidence insufficient to show possession by vehicle passenger. — In a trial for possession of marijuana, where a codefendant, appearing as a defense witness claimed ownership of the contraband and testified that the defendant and another had not known of its presence in the automobile, it was established without dispute that the defendant had neither a possessory nor a proprietary interest in the vehicle but was simply occupying it as

a passenger. Therefore, the trial court erred in denying defendant's motion for directed verdict. *Llaguno v. State*, 197 Ga. App. 789, 399 S.E.2d 564 (1990).

Since the circumstantial evidence failed to establish a connection between the defendant and the cocaine other than the fact that the cocaine was found hidden in a package on the floor behind the driver's seat in a car in which the defendant was riding in the front passenger seat, a conviction for knowingly possessing more than 400 grams of a mixture containing at least 10 percent cocaine was reversed. *Hodges v. State*, 277 Ga. App. 174, 626 S.E.2d 133 (2006).

Evidence sufficient to support conviction of trafficking in methamphetamine. — See *Cook v. State*, 226 Ga. App. 113, 485 S.E.2d 595 (1997); *Neill v. State*, 247 Ga. App. 152, 543 S.E.2d 436 (2000).

Evidence was sufficient to support the jury's finding that the defendants knowingly possessed more than 28 grams of cocaine found in the defendants' car, and were guilty of trafficking in cocaine after inter alia, officers searched the car and found a package containing 165 grams of crack cocaine under the front passenger seat and another package containing 235 grams of powder cocaine in a bag sitting on the back seat. *Wiggins v. State*, 258 Ga. App. 703, 574 S.E.2d 896 (2002).

Evidence that the first defendant actually handled and attempted to sell the nearly 450 grams of methamphetamine to the undercover officer, and the second defendant not only accompanied the first defendant to the scene but also sat in the seat under which the drugs were stored prior to their attempted sale was sufficient to support convictions for trafficking in methamphetamine. Evidence that the third defendant's participation was voluntary and not the product of entrapment was sufficient to sustain that defendant's conviction. *Baggs v. State*, 265 Ga. App. 282, 593 S.E.2d 734 (2004).

Evidence was sufficient for a rational trier of fact to find that the defendant was guilty beyond a reasonable doubt of trafficking in methamphetamine since, among other things, the testimony of the codefendant was corroborated by the fact that, at the time of the defendant's arrest,

methamphetamine was found behind the front passenger seat of the car the defendant was driving, and the defendant had items in the defendant's pocket commonly known to be drug paraphernalia. *Garmon v. State*, 265 Ga. App. 622, 594 S.E.2d 779 (2004).

Evidence was sufficient to support the defendant's conviction for trafficking in methamphetamine under O.C.G.A. § 16-13-31(e) as: (1) methamphetamine, weighing 59.49 grams, was found in the defendant's truck; (2) the defendant was the sole occupant and admitted owner of the truck; (3) the methamphetamine was found hidden near where the defendant was sitting; (4) the defendant had recently ingested methamphetamine; and (5) the defendant provided no evidence of equal access by others. *Craig v. State*, 274 Ga. App. 504, 617 S.E.2d 653 (2005).

Based on the defendant's confession to selling methamphetamine and the other evidence, including a videotape of the transaction, the evidence was sufficient to support a conviction under O.C.G.A. § 16-13-31(e). *Graves v. State*, 274 Ga. App. 855, 619 S.E.2d 356 (2005).

Because the informant's testimony was the only testimony in which defendant was identified as the person who sold the methamphetamine to the informant in violation of O.C.G.A. § 16-13-31, there was sufficient evidence to support the conviction; under O.C.G.A. § 24-4-8, the testimony of one witness was sufficient to establish defendant's identity. *Vasquez v. State*, 275 Ga. App. 548, 621 S.E.2d 764 (2005).

Sufficient circumstantial evidence supported the defendant's conviction for trafficking in methamphetamine, in violation of O.C.G.A. § 16-13-31, because testimony from police agents and task force members who were part of the surveillance or take-down of the defendant established that an informant had arranged a drug deal, the designated vehicle drove up to the specified location, the defendant was identified as the individual who exited the vehicle and was on the phone with the informant at the time that the vehicle arrived at the location, and drugs were found in the vehicle; the testimony of the

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agents was based on the agents' observations and actions and was not hearsay. *Diaz v. State*, 275 Ga. App. 557, 621 S.E.2d 543 (2005).

Because the defendant, who was a passenger in a vehicle stopped by police, and the vehicle's driver had different responses when the arresting officers asked them where they were going, and a bag containing about three pounds of methamphetamine was found between the passenger's and driver's seats, and the defendant fled the scene, and the packaging of the methamphetamine was very similar to the packaging of the cocaine, marijuana, and cash found at the defendant's residence two months earlier, the evidence was sufficient for a rational trier of fact to find the defendant guilty beyond a reasonable doubt of trafficking in methamphetamine and of possession of methamphetamine with intent to distribute. *Salinas-Valdez v. State*, 276 Ga. App. 732, 624 S.E.2d 278 (2005).

Evidence was sufficient to sustain a conviction of trafficking in methamphetamine when a confidential informant (CI) arranged to have drugs delivered to a mall, a short time later, the defendant arrived in a taxi and entered the mall, the CI then received a call and told the caller that the CI had moved to a different location, the defendant came out of the mall, and got back into the taxi, and the officers stopped the defendant with the drugs. *Flores v. State*, 277 Ga. App. 211, 626 S.E.2d 181 (2006).

Trial court's denial of a motion for a directed verdict of acquittal pursuant to O.C.G.A. § 17-9-1 was proper as the evidence was sufficient to support a conviction of trafficking in methamphetamine, in violation of O.C.G.A. § 16-13-31(e); there was clearly evidence that the sale of the drug involved more than 28 grams of methamphetamine, that defendant either possessed or sold the methamphetamine through the defendant's presence when the drug was being cut, weighed, packaged, and sold, and that the defendant was liable as an aider and abettor under O.C.G.A. § 16-2-21 even if there was no evidence that the defendant either ar-

ranged the sale or received any money in connection therewith. *Blackwood v. State*, 277 Ga. App. 870, 627 S.E.2d 907 (2006).

Trial court did not err in denying defendant's motion for a directed verdict of acquittal on a charge of trafficking methamphetamine in violation of O.C.G.A. § 16-13-31(e) based on insufficient evidence, given the various items seized from the defendant's property that were indicative of the manufacture of methamphetamine as well as the samples of substances that tested positive for methamphetamine. *Wesson v. State*, 279 Ga. App. 428, 631 S.E.2d 451 (2006).

Defendant's conviction for methamphetamine trafficking was supported by sufficient evidence as: (1) on the basis of a tip from a confidential informant, the police made a controlled buy of methamphetamine from a codefendant dropped off from a car driven by the defendant; (2) the codefendant testified that the defendant had arranged to drop the codefendant off in the driveway, circle the neighborhood, and pick the codefendant up; and (3) a second codefendant had also been a passenger in the car and testified that the second codefendant and the defendant ran a methamphetamine business together. *Temples v. State*, 280 Ga. App. 874, 635 S.E.2d 249 (2006).

Sufficient evidence supported the defendant's conviction of trafficking in methamphetamine in violation of O.C.G.A. § 16-13-31; the vehicle in which the methamphetamine was found was the defendant's vehicle and the defendant had been driving the vehicle, the defendant was found with methamphetamine on the defendant's person, and although there had been a passenger, the passenger had not been in the car alone. *Giacini v. State*, 281 Ga. App. 426, 636 S.E.2d 145 (2006).

Evidence that the defendant helped direct a witness to a police informant's home in order to buy a pound of methamphetamine, combined with the defendant's previous contact with the informant, showed more than mere presence, and, at a minimum, showed that the defendant was guilty as a party to the offense of trafficking in methamphetamine. *Lopez v. State*, 281 Ga. App. 623, 636 S.E.2d 770 (2006).

Despite the defendant's denial of any knowledge of the existence of drugs and other contraband in a motel room in which the defendant was the sole occupant, evidence of the contraband found in close proximity to other evidence which the defendant admitted owning, when coupled with the fact that only one key to the room existed, which the defendant admitted to having, and that no one had brought anything into the room since the person the defendant alleged was the owner of the evidence had left, was sufficient to support the defendant's convictions under O.C.G.A. §§ 16-11-106, 16-13-2, 16-13-30, and 16-13-31. *Hall v. State*, 283 Ga. App. 266, 641 S.E.2d 264 (2007).

There was sufficient evidence to support a conviction of trafficking in methamphetamine; the defendant participated in phone calls in which the defendant's over interest arranged to deliver methamphetamine to an informant and had driven the car used to lead the person making the delivery to the informant's house. *Gonzalez v. State*, 283 Ga. App. 843, 643 S.E.2d 8 (2007).

In a prosecution for trafficking in methamphetamine: (1) no error resulted from the admission of evidence of a 2003 incident in which officers investigated the defendant's involvement in another drug case; (2) admission of evidence regarding the two packs of crystalline substance that were not tested was not erroneous; and (3) the fact that portions of the suspected methamphetamine had not been tested went to the weight of the evidence and not the admissibility of the evidence. *Perry v. State*, 283 Ga. App. 520, 642 S.E.2d 141 (2007).

Defendant's trafficking in methamphetamine conviction was upheld as the evidence showed that: (1) no compelling reason existed to grant a continuance of the trial; and (2) the defendant failed to show that but for counsel's alleged inactions, the outcome of the trial would have been different or aided in the presentation of a defense. *Hartley v. State*, 283 Ga. App. 388, 641 S.E.2d 607 (2007).

Despite the defendant's contrary contentions, evidence seized via the execution of a valid search warrant, specifically a

substantial amount of methamphetamine, a set of scales in a case marked "dope kit inside," a .38 revolver, common tools of the drug trade, written instructions for making pure ephedrine, a loose bag of vitamin B-12 commonly used to dilute methamphetamine, over \$2,000 in cash, and evidence that the defendant installed a video surveillance system to monitor the front door and driveway, both a trafficking in methamphetamine and possession of a weapon by a convicted felon conviction were supported by sufficient evidence. *McTaggart v. State*, 285 Ga. App. 178, 645 S.E.2d 658 (2007).

Sufficient corroboration existed to support a defendant's conviction for trafficking in methamphetamine after a police informant testified that the defendant appeared to be involved in the deal and the state also offered testimony that a person would not simply tag along to a drug transaction involving over 400 grams of methamphetamine. *Casanova v. State*, 285 Ga. App. 554, 646 S.E.2d 754 (2007).

Because the state did not rely solely on the fact that the drugs were found in the defendant's hotel room, but also presented evidence that a large bag of methamphetamine was found inside a hard drive which the defendant expressly claimed ownership of, this fact constituted additional evidence of possession of the methamphetamine and contraband seized to support a trafficking conviction. *Miller v. State*, 287 Ga. App. 179, 651 S.E.2d 103 (2007).

Evidence was sufficient to support a conviction under O.C.G.A. § 16-13-31(e), despite an equal access defense, given the evidence linking the defendant to the methamphetamine found, and the defendant's unusual nervousness following the traffic stop. *Arellano v. State*, 289 Ga. App. 148, 656 S.E.2d 264 (2008).

Evidence authorized a finding that defendant was guilty as a party to trafficking methamphetamine and not merely a passenger in the codefendant's truck where the codefendant testified that the defendant obtained methamphetamine from a third party and was the supplier for the deal, the defendant admitted that the defendant had previously purchased methamphetamine from the third party

Sufficiency of Evidence (Cont'd)

and knew what was going on when the defendant and the codefendant met with the third party, and the defendant remained in the truck when the codefendant took the methamphetamine and got into an agent's vehicle to make the sale. *Russell v. State*, 289 Ga. App. 789, 658 S.E.2d 400 (2008).

Evidence supported a conviction of trafficking in methamphetamine when the defendant was driving a vehicle that contained 441.11 grams of amphetamine, over which the defendant presumptively had possession and control, the drug was on the seat directly behind the defendant, and the vehicle was registered to another person, which an investigator testified was common among drug dealers; the defendant had not presented any evidence to rebut the presumption of possession, and as both the defendant and the defendant's passenger were charged with the crime of possession, the equal access rule did not apply. *Ramirez v. State*, 290 Ga. App. 3, 658 S.E.2d 790 (2008).

There was sufficient corroborating evidence to support a defendant's conviction for violating the Georgia Controlled Substances Act, O.C.G.A. § 16-13-31(e), as the defendant's presence with a codefendant outside the rurally located barn where the methamphetamine was found corroborated the codefendant's testimony that some of the drugs belonged to the defendant. *Dingler v. State*, 293 Ga. App. 27, 666 S.E.2d 441 (2008).

Defendant's convictions for trafficking in methamphetamine and possession of cocaine were upheld on appeal as the jury was authorized to find that the defendant constructively possessed the contraband since the defendant lived at the apartment searched by consent and despite the fact that others living in the apartment had equal access to the drugs. Additionally, the defendant was found lying on a mattress atop a bag containing more than an ounce of methamphetamine. *Maldonado v. State*, 293 Ga. App. 356, 667 S.E.2d 156 (2008).

Trial court properly denied a defendant's motion for a directed verdict of acquittal and the defendant's motion for a

new trial with regard to the defendant's conviction for trafficking in methamphetamine as the defendant failed to rebut the presumption that finding the defendant in possession of such a large amount of drugs was sufficient to establish trafficking. The reviewing court noted that it was for the jury to decide if the defendant rebutted the presumption and the fact that a codefendant owned the vehicle in which the drugs were found and had equal access to the drugs was not sufficient to rebut the presumption. *Navarro v. State*, 293 Ga. App. 329, 667 S.E.2d 125 (2008).

There was sufficient evidence to support a conviction for trafficking methamphetamine. Although a person could not be convicted of a felony based solely on an accomplice's uncorroborated testimony, there was no evidence that the friend who testified against the defendant was an accomplice; furthermore, an officer's sighting of the defendant with a dog within walking distance of the residence that the defendant left with a dog, the defendant's appearance at a convenience store that was consistent with the violent argument described by the friend, the defendant's arrest there with the gun the friend said the defendant had left with, and the discovery of the defendant's photographs at the residence would be sufficient corroboration of the friend's testimony. *Honeycutt v. State*, 293 Ga. App. 614, 668 S.E.2d 19 (2008).

Because a police officer properly stopped defendant's car for a suspended registration, saw what appeared to be a weapon in defendant's fanny pack, and the suspected methamphetamine was found in plain view during a limited protective search and while the officer was engaged in a lawful arrest; accordingly, the defendant's constitutional rights were not violated, and the defendant was properly convicted of trafficking in methamphetamine and possession of methamphetamine with intent to distribute under O.C.G.A. §§ 16-13-30(b) and 16-13-31(e). *Eaton v. State*, 294 Ga. App. 124, 668 S.E.2d 770 (2008).

Sufficient evidence existed to convict a defendant of trafficking in methamphetamine (meth) under O.C.G.A. § 16-13-31(e)

because evidence showed that the defendant had actual possession of the drugs when the defendant arrived at an apartment complex with the meth and showed the meth to the confidential informant; the defendant also admitted possession of the drugs during a cell phone conversation with an undercover detective, and undercover officers observed the transfer of the drugs to the defendant's accomplice in an ice cream van. *Escobar v. State*, 296 Ga. App. 898, 676 S.E.2d 291 (2009).

Evidence at trial was sufficient to enable the jury to find the defendant guilty of trafficking in methamphetamine because the codefendant testified that the defendant and the defendant's daughter sold drugs from the defendant's house, and the defendant tested positive for methamphetamine the day of the search; a rebuttable presumption arose that the defendant possessed the methamphetamine because the defendant was the owner of the house in which the methamphetamine was found, and it was found in the defendant's bedroom, and because a codefendant was a member of the defendant's immediate household, evidence of the codefendant's access was not sufficient to rebut the presumption against the defendant and did not demand an acquittal under the equal access rule. *Swan v. State*, 300 Ga. App. 667, 686 S.E.2d 310 (2009).

Evidence was sufficient to convict defendant of a conspiracy to traffic in methamphetamine based on the defendant's understanding with the defendant's spouse regarding the spouse's drug sales, and testimony of drug enforcement agents and co-indictees as well as drugs, money, and drug paraphernalia obtained during a search of the residence the defendant shared with the spouse, who had engaged in three sales of this contraband. *Williamson v. State*, 300 Ga. App. 538, 685 S.E.2d 784 (2009), cert. denied, No. S10C0387, 2010 Ga. LEXIS 191 (Ga. 2010).

Although a mixture containing 233 grams of methamphetamine was wet because the methamphetamine was recovered from a toilet in defendant's apartment, the evidence was sufficient to show that defendant trafficked in 200 grams or

more of a mixture containing methamphetamine because the testimony did not show that the substance weighed more due to being wet, and in any event, there was evidence of defendant's possession of an additional 29.60 grams of a mixture containing methamphetamine. *Santibanez v. State*, 301 Ga. App. 121, 686 S.E.2d 884 (2009).

Jury was authorized to find the defendant guilty of trafficking in methamphetamine beyond a reasonable doubt because the evidence was sufficient to show more than the defendant's mere presence and spatial proximity to the methamphetamine drugs when the defendant and the codefendant, who was the defendant's boyfriend, lived at the residence where the drugs were found, and the presumption that the defendants had joint possession of the drugs was not rebutted by the evidence; the defendant had sold methamphetamine to an informant during the controlled buy, the money used to make the drug purchase was located during the subsequent search of the defendant's purse, and two individuals who had been arrested at the residence testified at trial that the defendant had supplied those individuals with methamphetamine. *Fyfe v. State*, 305 Ga. App. 322, 699 S.E.2d 546 (2010).

Defendant was not entitled to a directed verdict of acquittal because the jury was authorized to find the defendant guilty of trafficking in methamphetamine in violation of O.C.G.A. § 16-13-31(e) beyond a reasonable doubt since the evidence was sufficient to show that the defendant knowingly had the power and intention to exercise dominion and control over the drugs, which were stashed inside a green vehicle; the defendant had moments earlier given an accomplice the keys to the vehicle, told the accomplice where to drive and park the vehicle, and led the accomplice to a motel. *Flores v. State*, 308 Ga. App. 368, 707 S.E.2d 578 (2011).

Trial court did not err in convicting the defendant of trafficking in methamphetamine in violation of O.C.G.A. § 16-13-31(f)(1) because given the evidence, the jury was authorized under O.C.G.A. § 24-4-6 to find that the defendant was guilty beyond a reasonable

Sufficiency of Evidence (Cont'd)

doubt as either the actual perpetrator or as a party to the crime of the offense of trafficking in methamphetamine as charged in the indictment; officers executing a search warrant for a house discovered the defendant on a couch with a codefendant and baggies of methamphetamine. *Hughes v. State*, No. A11A0127, 2011 Ga. App. LEXIS 325 (Apr. 6, 2011).

Evidence insufficient to sustain conviction for trafficking in cocaine.

— See *Crenshaw v. State*, 183 Ga. App. 527, 359 S.E.2d 419 (1987); *Cochran v. State*, 190 Ga. App. 884, 380 S.E.2d 319 (1989); *Jordan v. State*, 225 Ga. App. 424, 484 S.E.2d 60 (1997); *Stevens v. State*, 245 Ga. App. 237, 537 S.E.2d 688 (2000); *Baltazar v. State*, 254 Ga. App. 773, 564 S.E.2d 202 (2002).

Defendant's trafficking in cocaine conviction was reversed on appeal, as the state failed to present sufficient evidence linking the defendant to the cocaine found in a house, the defendant had no tie to the house as an occupant or resident, and the act of standing in the front of the house when officers approached the defendant amounted to mere spatial proximity, which on its own, was insufficient to link the defendant to the crime; moreover, because the evidence showed that another individual, who was later incarcerated on drug charges, lived at the residence at that time, such gave rise to an un rebutted reasonable hypothesis that this other individual possessed the drugs in question. *Brown v. State*, 285 Ga. App. 330, 646 S.E.2d 273 (2007), cert. denied, 2007 Ga. LEXIS 750 (Ga. 2007).

An officer exceeded the permissible scope of a consent frisk for weapons as nothing indicated that a cigar box that the officer removed from a defendant's pocket felt like a gun or other weapon, and the officer pointed to no particularized facts that reasonably led the officer to believe that the defendant might have a weapon. Thus, crack cocaine found in the box was inadmissible, and in the absence of this evidence, there was insufficient evidence to convict the defendant of possession of cocaine with the intent to distribute.

Brown v. State, 293 Ga. App. 564, 667 S.E.2d 410 (2008).

Circumstantial evidence consisting of the following facts was insufficient to convict defendant of cocaine trafficking: defendant was a passenger in a car, which was owned by defendant's brother and driven by a friend; the car's trunk contained two kilos of cocaine; the car led police on a high speed chase across state lines; and the car crashed near defendant's relatives' home. *Foster v. State*, 300 Ga. App. 446, 685 S.E.2d 422 (2009), cert. denied, No. S10C0361, 2010 Ga. LEXIS 164 (Ga. 2010).

Manufacture of methamphetamine.

— Evidence was sufficient to convict defendant of possession and manufacture of methamphetamine. *Query v. State*, 217 Ga. App. 61, 456 S.E.2d 704 (1995).

Defendant's conviction for criminal attempt to manufacture methamphetamine was supported by the evidence because: (1) the defendant's wife informed law enforcement authorities that the defendant was manufacturing methamphetamine; (2) the defendant was discovered at a motel and was arrested; and (3) a forensic chemist testified that the items found in the defendant's motel room were those used in the manufacture of methamphetamine. *Elliot v. State*, 274 Ga. App. 73, 616 S.E.2d 844 (2005).

Evidence sufficient for trafficking in amphetamine conviction.

— Circumstantial evidence demonstrating that defendant had a key to the house searched, received mail there, and kept clothes there was sufficient to sustain trafficking in amphetamine conviction under O.C.G.A. § 16-13-31(e), and defendant's equal access defense did not apply. *Swanger v. State*, 251 Ga. App. 182, 554 S.E.2d 207 (2001).

Identification testimony based on photograph of defendant erroneously admitted.

— In the prosecution for the sale of cocaine and methamphetamine, the trial court erred in allowing an officer to identify the defendant in two surveillance photographs based on the officer's familiarity with the defendant's appearance and absent a change in the defendant's appearance because the testimony was offered to establish a fact which the

jurors could decide for themselves; hence, the evidence was erroneously admitted as invading the jury's province to decide the issue. *Mitchell v. State*, 283 Ga. App. 456, 641 S.E.2d 674 (2007).

Evidence held sufficient. — Although no evidence was presented as to the ownership of a Nissan Pathfinder parked at the scene of the crime, the defendant was not entitled to a judgment of acquittal as sufficient evidence was presented to not only link the defendant with that vehicle where the trafficking amount of drugs was found, but also to support a finding of guilt as a party to the crime; moreover, the jury could conclude that as a party to the crimes charged, the defendant was actively involved in a criminal enterprise to possess the methamphetamine stashed inside the vehicle. *Sherrer v. State*, 289 Ga. App. 156, 656 S.E.2d 258 (2008), cert. denied, 2008 Ga. LEXIS 391 (Ga. 2008).

There was sufficient evidence to support the defendant's conviction for trafficking marijuana as the jury was authorized to conclude that it was not reasonable, as the defendant suggested, that someone other than the defendant placed over 21 pounds of marijuana in open view in the back of a trailer of which the defendant had the only key, without the defendant's knowledge. *Mora v. State*, 292 Ga. App. 860, 666 S.E.2d 412 (2008).

Evidence sustained the finding of guilt on the charge of trafficking in cocaine because knowledge of the weight or precise purity of the cocaine was not necessary for a conviction. *Barr v. State*, 302 Ga. App. 60, 690 S.E.2d 643 (2010).

Evidence held insufficient. — Evidence was not sufficient to convict defendant where defendant "acted a little nervous" at the scene, a pager was found in the glove compartment, and that in defendant's wallet was a list "full of different phone numbers" as the state adduced no evidence to connect the pager, the phone numbers, or the digits with dollar signs to telltale signs of criminality. *Hughes v. State*, 215 Ga. App. 6, 449 S.E.2d 547 (1994).

Evidence was insufficient to support conviction of trafficking in amphetamine where the charge was brought under a portion of O.C.G.A. § 16-13-31 that re-

quired proof that defendant knowingly possessed 28 grams or more of amphetamine and a chemist testified that a substance recovered from the defendant that weighed 28.8 grams contained only 40 to 60 percent pure amphetamine; however, evidence did support conviction for possession of amphetamine. *Daniel v. State*, 251 Ga. App. 792, 555 S.E.2d 154 (2001).

After an investigating officer took various containers used to cook methamphetamine from the inside and outside of defendant's trailer home and scraped residue from the inside of the containers into one pile, the evidence only showed that the mixture of materials from all the containers contained some unknown quantity of methamphetamine and weighed 90.5 grams; thus, it was impossible to determine how much of the material was methamphetamine and how much may have been simply ephedrine or something else. *Hill v. State*, 253 Ga. App. 658, 560 S.E.2d 88 (2002).

There was an initial one-ounce sale of methamphetamine between defendant and the supplier, but each week thereafter, for about four months, defendant called the supplier and requested one-half ounce of methamphetamine or less; thus, there was insufficient evidence of an agreement to act together to sell or deliver 28 grams, and defendant's trafficking conviction was reversed. *Pruitt v. State*, 264 Ga. App. 44, 589 S.E.2d 864 (2003).

State failed to prove the state's case that defendant, a minor, was delinquent under O.C.G.A. § 15-11-2 for trafficking in cocaine, in violation of O.C.G.A. § 16-13-31, as the state did not prove the necessary connection between the defendant and the drugs, other than spatial proximity, which was insufficient; the fact that the defendant was in a house in the middle of the night with non-family members, that a large amount of cocaine and cash were found in the house, although not visible, and that the defendant was sitting on a couch where a bag containing crack cocaine was found did not establish the necessary connection and did not exclude all other possibilities except the guilt of the defendant under O.C.G.A. § 24-4-6. *In re E.A.D.*, 271 Ga. App. 531, 610 S.E.2d 153 (2005).

Sufficiency of Evidence (Cont'd)

Defendant's conviction for trafficking in methamphetamine was reversed on appeal as there was no evidence that the defendant, who had entered a hotel room with another person carrying three plastic food containers holding the contraband, had actual possession of the contraband to make the defendant a party to the crime. It was not enough that the defendant saw the contents of the containers as others had equal access to the drug at the time of arrest. *Benitez v. State*, 295 Ga. App. 658, 673 S.E.2d 46 (2009).

Evidence was not sufficient to convict the defendant of trafficking in methamphetamine in violation of O.C.G.A. § 16-13-31(e) because a known drug dealer, who was on the defendant's premises at the time police arrived and conducted a search, was the only person possessing sufficient methamphetamine and the evidence did not show that the defendant had control over the drugs on the dealer's person or any basis to attribute these drugs to the defendant, particularly as the dealer had always advanced the defendant much smaller amounts of methamphetamine. *Peacock v. State*, 301 Ga. App. 873, 689 S.E.2d 853 (2010).

Trial court erred in convicting the defendant of trafficking in methamphetamine in violation of O.C.G.A. § 16-13-31(e)(3) because although the evidence raised grave suspicions of the defendant's guilt, the state failed to establish that the defendant had both the power and the intention at the time of the defendant's arrest to exercise dominion or control over the drugs and failed to show that other men did not have equal access to the house and the items within the house; all of the evidence was circumstantial with regard to the defendant's constructive possession of the contraband, there was nothing in the case linking the defendant to the drugs or manufacturing equipment in the house, and several other people with access to the house were unaccounted for and were not charged. *Aquino v. State*, 308 Ga. App. 163, 706 S.E.2d 746 (2011).

Codefendant's conviction for trafficking in methamphetamine in violation of

O.C.G.A. § 16-13-31(e) could not be upheld on the ground that the codefendant was a party to the crime of trafficking in methamphetamine because the state failed to adduce evidence that the codefendant intentionally caused another to commit the crime, aided or abetted in the commission of the crime, or advised or encouraged another to commit the crime; thus, the state's evidence did not show essential links between the codefendant's proven behavior and the drug trafficking charge. *Flores v. State*, 308 Ga. App. 368, 707 S.E.2d 578 (2011).

Trial court erred in denying the codefendant's motion for a directed verdict after the codefendant was convicted of trafficking in methamphetamine in violation of O.C.G.A. § 16-13-31(e) because the evidence against the codefendant was insufficient to authorize a rational trier of fact to find beyond a reasonable doubt that the codefendant was in actual or constructive possession of the drugs found in a vehicle, and there was no presumption of drug possession since there was no evidence that the codefendant owned or controlled the vehicle in which the drugs were found; there was no evidence that the codefendant had even been in or had any connection to that vehicle, no testimony implicated the codefendant in the transaction, and the evidence showed nothing more than the codefendant's presence in the vehicle with the defendant, but there was no evidence that the codefendant had the power and intent to exercise control over the drugs. *Flores v. State*, 308 Ga. App. 368, 707 S.E.2d 578 (2011).

Evidence insufficient to revoke probation. — Defendant's probation was improperly revoked based on the defendant's alleged trafficking in cocaine, O.C.G.A. § 16-13-31(a)(1), as an informant's hearsay statements were not competent to show the defendant arranged a drug sale, and no evidence connected the defendant with cocaine found in a house where the informant said the sale was to occur. That the defendant was sitting in front of the house and fled from police was insufficient to show the defendant's constructive possession of the cocaine as none of the defendant's belongings were inside the house; the defendant did not live there;

and there was no evidence the defendant had ever been inside the house. *Brown v. State*, 294 Ga. App. 1, 668 S.E.2d 490 (2008).

In a "reverse sting" case, the authorities conducting the sting arrested the defendants before the defendants acquired possession of the drug and therefore the convictions for trafficking in cocaine are reversed. *Epps v. State*, 251 Ga. App. 645, 555 S.E.2d 25 (2001).

Trial court did not abuse its discretion by permitting similar transaction evidence. — Given the substantial evidence of defendant's guilt, a trial court did not abuse its discretion by permitting evidence showing the commission of similar transactions, in the nature of two out-of-state traffic stops which led to searches and discovery of drugs and drug paraphernalia on defendant, because there was no reasonable probability that the results of the trial would have been different had the evidence been excluded. *Goldsby v. State*, 273 Ga. App. 523, 615 S.E.2d 592 (2005).

Consent to search properly imposed as probation condition. — Trial court did not err in denying the defendant's motion to suppress as a consent to search was properly imposed as a condition of the defendant's probation and did not amount to a waiver of rights; thus, the defendant's tacit acceptance of this special condition provided the police with the authority to search. *Peardon v. State*, 287 Ga. App. 158, 651 S.E.2d 121 (2007).

Motions to suppress drug evidence based on consent and Miranda denied. — Trial court did not err in denying either defendant's motion to suppress the methamphetamine seized during the consensual search of defendant's vehicle or a motion to suppress defendant's voluntary custodial statement as the testimony of the arresting and investigating officers established that the defendant did not display any problems with the understanding of the English language as did videotapes of the vehicle search and the in custody interview, which likewise showed the defendant having no problems with the English language. Therefore, defendant's consent to the search of the vehicle nor defendant's waiver of defendant's

Miranda rights were invalidated. *Serrano v. State*, 291 Ga. App. 500, 662 S.E.2d 280 (2008).

Failure to give circumstantial evidence charge was error. — Trial court's failure to give the circumstantial evidence charge under O.C.G.A. § 24-4-6 constituted reversible error even though the defendant failed to request such a charge because the evidence against a defendant in a cocaine trafficking case under O.C.G.A. § 16-13-31(a)(1) was entirely circumstantial based on the defendant's participation in the crime with defendant's brother and a third party. *Martinez v. State*, 303 Ga. App. 71, 692 S.E.2d 737 (2010).

Sentencing

Fine does not violate defendant's constitutional rights. — When defendant was convicted of trafficking in cocaine in violation of O.C.G.A. § 16-13-31 and was sentenced to 20 years imprisonment and fined \$100,000, the fine was not out of proportion to the severity of the crime and not constitutionally infirm either because of the fine's mandatory nature or the fine's amount. *Wyatt v. State*, 259 Ga. 208, 378 S.E.2d 690 (1989).

Sentence reduction provision not unconstitutionally vague. — Term "substantial assistance" in O.C.G.A. § 16-13-31(e)(2) (now (f)(2)), regarding reduced sentences for those convicted of drug trafficking, is not too vague for persons of ordinary intelligence to understand. *Brugman v. State*, 255 Ga. 407, 339 S.E.2d 244 (1986).

Sentence does not violate Fifth Amendment rights. — O.C.G.A. § 16-13-31(e)(2) (now (f)(2)), regarding reduced sentences for those convicted of drug trafficking, does not compel a defendant to exchange the defendant's Fifth Amendment rights for a chance at a reduced sentence as it only requires the defendant to provide information about other persons involved in the same crime for which the defendant has already been convicted. *Brugman v. State*, 255 Ga. 407, 339 S.E.2d 244 (1986).

Legislative intent. — Most reasonable interpretation of the legislative intent in enacting O.C.G.A. § 16-13-31(f)(1)

Sentencing (Cont'd)

was to supplant the general punishment provision of O.C.G.A. § 16-13-30(b) with a specific and potentially more harsh punishment provision for manufacturing methamphetamine. *Richards v. State*, 290 Ga. App. 360, 659 S.E.2d 651 (2008).

Separate offenses may be subject to only one punishment. — If separate offenses charged in one indictment were committed at the same time and place as parts of a continuous criminal act, and inspired by the same criminal intent, they are susceptible of only one punishment. *York v. State*, 242 Ga. App. 281, 528 S.E.2d 823 (2000).

Discussion of relationship between sentencing provisions of O.C.G.A. §§ 16-13-31 and 17-10-2, dealing with presentence hearings. — See *Paras v. State*, 247 Ga. 75, 274 S.E.2d 451 (1981).

O.C.G.A. § 16-13-31(a)(1)-(3) establishes the specific mandatory minimum sentences for trafficking in cocaine and subsection (f) (now (g)) provides a general maximum sentence. *Recoba v. State*, 179 Ga. App. 31, 345 S.E.2d 81 (1986).

It is the conviction of the specific trafficking offense which authorizes a particular sentence and not the language of the indictment. The defendants' sentence was within the maximum sentence for the offense and was therefore not invalid or illegal. *Moon v. State*, 194 Ga. App. 777, 392 S.E.2d 19 (1990).

General sentencing provision superfluous. — In view of the specific sentences required for a specified offense under O.C.G.A. § 16-13-31, subsection (f) (now (g)) is a general provision and in large part a superfluity. *Steward v. State*, 182 Ga. App. 659, 356 S.E.2d 890 (1987).

Construction with probated and suspended sentence provisions. — Mandatory sentence provisions of O.C.G.A. § 16-13-31(e) (now (f)), by its express terms, is removed from the application of the probated and suspended sentence provisions of O.C.G.A. § 17-10-1(a). *Moran v. State*, 170 Ga. App. 837, 318 S.E.2d 716 (1984).

Pursuant to O.C.G.A. § 16-13-31(g)(1), the trial court lacked the authority to probate or suspend sentences imposed

against two defendants in unrelated criminal actions, and neither the 2004 nor the 2006 amendments to the general sentencing provisions under O.C.G.A. § 17-10-1(a)(1) were relevant; moreover, because O.C.G.A. §§ 17-10-6.1 and 17-10-6.2 were statutes that defined certain categories of crimes and provided the sentencing guidelines for those categories, it did not appear that the list of these two exceptions normally would have included § 16-13-31 or any other specific criminal statute, and any omission would be significant only with regard to a statute that defined classes or categories of crimes. *Gillen v. State*, 286 Ga. App. 616, 649 S.E.2d 832 (2007), cert. denied, 2007 Ga. LEXIS 809 (Ga. 2007).

O.C.G.A. § 16-13-31(e) (now (f)) does not conflict with parole authority of State Board of Pardons and Paroles granted under Ga. Const. 1976, Art. IV, Sec. II, Para. I (see now Ga. Const. 1983, Art. IV, Sec. II, Para. II). *Paras v. State*, 247 Ga. 75, 274 S.E.2d 451 (1981).

Presentence hearing was not required when the court imposed the statutory minimum sentence for cocaine trafficking under O.C.G.A. § 16-13-31(a)(1)(C). *Edwards v. State*, 219 Ga. App. 239, 464 S.E.2d 851 (1995).

Power to move for sentence reduction not reserved for district attorney alone. — Acts constituting "substantial assistance" as contemplated by O.C.G.A. § 16-13-31(e)(2) (now (f)(2)) may be brought to the attention of the sentencing court by motion of either the district attorney or the defendant, or the sentencing court may make its own inquiry into the matter. *Brugman v. State*, 255 Ga. 407, 339 S.E.2d 244 (1986); *Swantner v. State*, 244 Ga. App. 372, 535 S.E.2d 343 (2000).

Judge not required to reduce or suspend sentence. — O.C.G.A. § 16-13-31(e)(2) (now (f)(2)) does not by its terms require the judge to impose a reduced or suspended sentence in the event a defendant has rendered such assistance but instead merely authorizes the judge to do so. *Lastohkein v. State*, 199 Ga. App. 555, 405 S.E.2d 554 (1991).

Sentence upon conviction of trafficking in cocaine within the limits set by O.C.G.A. § 16-13-31(a)(1)(C) and sub-

section (g) was not so disproportionate as to shock the conscience. *Small v. State*, 243 Ga. App. 678, 534 S.E.2d 139 (2000).

No separate quantity used to prove trafficking charge distinct from possession charge. — Because both the trafficking and manufacturing charges against defendants arose from methamphetamine found in a cooler, no other quantity of methamphetamine was presented at trial, and there was no separate quantity of methamphetamine used to prove the trafficking charge, defendants were entitled to resentencing because the convictions merged and the trial court erred in sentencing for both offenses. *Goldsby v. State*, 273 Ga. App. 523, 615 S.E.2d 592 (2005).

Trafficking as a second violation of § 16-13-30. — Conviction for trafficking in cocaine under O.C.G.A. § 16-13-31 constituted a second violation of O.C.G.A. § 16-13-30(b) for purposes of the sentencing provisions of § 16-13-30(d) since the first conviction was for a more serious version of the offenses outlined in § 16-13-30(b). *Gilber v. State*, 208 Ga. App. 258, 430 S.E.2d 391 (1993).

Prior conviction triggers mandatory life sentence. — Defendant's conviction for more serious offense of trafficking in cocaine under O.C.G.A. § 16-13-31 was sufficient in conjunction with the defendant's previous conviction for possession of cocaine with intent to distribute under O.C.G.A. § 16-13-30(b) to trigger the mandatory life sentence provisions of § 16-13-30(d) and the state gave proper notice that the prior conviction would be used in aggravation at sentencing pursuant to § 16-13-30(d). *Brundage v. State*, 231 Ga. App. 478, 499 S.E.2d 408 (1998).

Life sentence appropriate. — Defendant's conviction for the more serious offense of trafficking in cocaine under O.C.G.A. § 16-13-31 was sufficient in conjunction with prior convictions for sale of cocaine to trigger the mandatory life sentence provision of O.C.G.A. § 16-13-30(d). *Covington v. State*, 231 Ga. App. 851, 501 S.E.2d 37 (1998).

Trial court's failure to follow the mandatory sentencing requirement for conviction of trafficking in methamphetamine in a quantity of 28

grams or more required that the sentence be vacated and remanded to the trial court with direction that the trial court follow the mandates of O.C.G.A. § 16-13-31(e)(1). *Conrad v. State*, 217 Ga. App. 388, 457 S.E.2d 592 (1995).

Assessment of a \$300,000 fine for trafficking in 87.5 grams of methamphetamine exceeded the trial court's authority. *Davis v. State*, 232 Ga. App. 450, 501 S.E.2d 241 (1998).

Second remand was required when, upon the defendant's conviction for trafficking in cocaine and after a prior remand, the trial court imposed the entire ten-year mandatory minimum prison sentence but refused to impose the fine of \$200,000 as such was mandatory under O.C.G.A. § 16-13-31(a)(1)(A). *State v. Andrews*, 278 Ga. App. 899, 630 S.E.2d 139 (2006).

Resentencing to include the mandatory fine did not violate double jeopardy. — Because O.C.G.A. § 16-13-31(f)(1) required a mandatory minimum sentence for trafficking in methamphetamine of ten years and a \$200,000 fine, and the sentence imposed by the trial court failed to include the fine, the trial court's resentencing to add the fine after the defendant began serving the sentence was valid and did not violate the defendant's double jeopardy rights. The suspended sentence provisions of O.C.G.A. § 17-10-1(a) were inapplicable to the mandatory sentence provisions of § 16-13-31, and there was no indication that the trial court intended to suspend the fine portion. *Strickland v. State*, 301 Ga. App. 272, 687 S.E.2d 221 (2009).

Life sentence under § 16-13-30. — Life sentence was properly imposed on the defendant under O.C.G.A. § 16-13-30 after the defendant was convicted of trafficking in cocaine. *Howard v. State*, 234 Ga. App. 260, 506 S.E.2d 648 (1998).

Sentencing deal for codefendant not shown. — Defendant failed to prove a Brady violation in the state's failure to reveal a deal the state made with a codefendant in exchange for the codefendant's substantial assistance because the defendant presented no evidence that there was a deal but merely argued that there must have been one because of the codefen-

Sentencing (Cont'd)

dant's sentence; all of the evidence showed there was no deal. *Pihlman v. State*, 292 Ga. App. 612, 664 S.E.2d 904 (2008), cert. denied, 2008 Ga. LEXIS 977 (Ga. 2008).

Sentence appropriate. — Trial court properly denied defendant's "new sentence" motion since it was a rehash of a prior motion to modify the sentence; defendant's 20-year sentence for cocaine possession was within the statutory range and was, therefore, not void as a matter of law. *Baez v. State*, 257 Ga. App. 129, 570 S.E.2d 352 (2002).

When the defendant was in possession of 434.72 grams of methamphetamine, the sentence of 25 years in prison and a one million dollar fine was mandated; given the large quantity and value of the methamphetamine, the sentence required by the legislature was not wholly irrational or grossly disproportionate to the severity of the crime, and because trafficking in methamphetamine was so lucrative, the mandatory sentence did not constitute cruel and unusual punishment. *Flores v. State*, 277 Ga. App. 211, 626 S.E.2d 181 (2006).

Upon a conviction of methamphetamine trafficking, because the sentence imposed by a trial judge against the defendant under O.C.G.A. § 16-13-31(g)(2) was supported by the record evidence that the defendant assisted the police in identifying a methamphetamine supplier, and did not result from an illegal departure from O.C.G.A. § 16-13-31(e)(1), the state's appeal from imposition of the sentence on grounds that the sentence was void was dismissed. *State v. Carden*, 281 Ga. App. 886, 637 S.E.2d 493 (2006).

Recidivist sentence imposed upon the defendant was upheld on appeal, pursuant to O.C.G.A. §§ 17-10-7(a) and 16-13-31(a)(1)(A) and (h), based on evidence of the defendant's 1993 convictions; hence, the defendant was properly sentenced to the longest period of time prescribed for the punishment of the offense, and ordered to serve the mandatory minimum of 10 years. *Smith v. State*, 282 Ga. App. 317, 638 S.E.2d 440 (2006).

O.C.G.A. § 16-13-31(g)(2) did not require the trial court to impose a reduced

or suspended sentence if the defendant rendered substantial assistance that led to the arrest or conviction of accomplices, accessories, coconspirators, or principals, but merely authorized the court to do so. Therefore, the defendant was properly given the mandatory minimum sentence for cocaine trafficking as the trial court found that the assistance the defendant rendered was not "substantial" since the assistance did not lead to the arrest of an associate, a codefendant, or a supplier. *Eidman v. State*, 295 Ga. App. 304, 671 S.E.2d 292 (2008).

Defendant was properly sentenced under O.C.G.A. § 16-13-31(a)(1)(B) for possession of 200 or more grams of cocaine because although the indictment only charged that the defendant did knowingly possess more than 28 grams, the jury returned a verdict, based on the testimony of a forensic expert, that the cocaine in the defendant's possession weighed 245.64 grams. *Singleton v. State*, 297 Ga. App. 452, 677 S.E.2d 348 (2009).

Trial court did not err in imposing a sentence under O.C.G.A. § 16-13-31(f) rather than O.C.G.A. § 16-13-30(b) for defendant's convictions for trafficking methamphetamine and possessing methamphetamine because the rule of lenity was inapplicable where violations of both O.C.G.A. §§ 16-13-30(b) and 16-13-31(f) were classified as felonies. *Poole v. State*, 302 Ga. App. 464, 691 S.E.2d 317 (2010).

Defendant's sentence of 30 years without parole for trafficking in cocaine was a sentence allowed under O.C.G.A. § 16-13-30(d), and hence, not illegal or void. Defendant could not have been sentenced under O.C.G.A. § 17-10-7(a), or defendant's sentence would have been 40 years. Because the sentence was not void, the sentence was not subject to modification under O.C.G.A. § 17-10-1(f). *State v. Blue*, 304 Ga. App. 471, 696 S.E.2d 692 (2010).

Sentence inappropriate. — Defendant's case was remanded for resentencing after a conviction for criminal attempt to manufacture methamphetamine because the trial court considered an uncertified Arkansas docket sheet in aggravation of sentence and a Tennessee

conviction that might not qualify as a prior felony in Georgia under the recidivist statute. *Elliot v. State*, 274 Ga. App. 73, 616 S.E.2d 844 (2005).

Merger. — Manufacturing methamphetamine was lesser-included offense of trafficking methamphetamine as charged. *Wesson v. State*, 279 Ga. App. 428, 631 S.E.2d 451 (2006).

Offense of manufacturing methamphetamine under O.C.G.A. § 16-13-30(b) was a lesser included offense of trafficking/manufacturing under O.C.G.A. § 16-13-31(f)(1); thus, the trial court was authorized to sentence a defendant for the greater offense after merging the lesser offense into it. *Richards v. State*, 290 Ga. App. 360, 659 S.E.2d 651 (2008).

Defendant's conviction for manufacturing marijuana in violation of O.C.G.A. § 16-13-30(j)(1) should have been merged into the defendant's conviction for trafficking in marijuana in violation of O.C.G.A. § 16-13-31(c) because the same evidence was used to prove both crimes, and the manufacturing count did not require proof of any fact which the trafficking count did not require. *Preval v. State*,

302 Ga. App. 785, 692 S.E.2d 51 (2010).

Sentence was not enhanced, nor was defendant sentenced as a recidivist. — With regard to a defendant's conviction for trafficking in cocaine, the trial court did not improperly consider similar transaction evidence of being arrested for trafficking in cocaine in 2004, as well as convictions that were reversed on appeal, in aggravation of the defendant's sentence because, although the state filed a notice of intent to seek recidivist punishment, the state did not offer certified copies of any convictions in evidence at sentencing and the defendant was not sentenced as a recidivist. *Celestin v. State*, 296 Ga. App. 727, 675 S.E.2d 480 (2009), cert. denied, No. S09C1200, 2009 Ga. LEXIS 340 (Ga. 2009).

Rule of lenity inapplicable. — Trial court did not err in failing to apply the rule of lenity because both of the defendant's offenses, trafficking in methamphetamine and misdemeanor possession of marijuana, O.C.G.A. §§ 16-13-30(e) and 16-13-31(b), were classified as felonies, and thus, the rule of lenity did not apply. *Fyfe v. State*, 305 Ga. App. 322, 699 S.E.2d 546 (2010).

RESEARCH REFERENCES

ALR. — Sufficiency of random sampling of drug or contraband to establish jurisdictional amount required for conviction, 45 ALR5th 1.

Propriety of lesser-included-offense charge in state prosecution of narcotics

defendant — Marijuana cases, 1 ALR6th 549.

Propriety of lesser-included-offense charge in state prosecution of narcotics defendant — Cocaine cases, 2 ALR6th 551.

16-13-31.1. Trafficking in ecstasy; penalties.

Any person who knowingly sells, manufactures, delivers, brings into this state, or has possession of 28 grams or more of 3, 4-methylenedioxyamphetamine or 3, 4-methylenedioxy-methamphetamine, or any mixture containing 3, 4-methylenedioxyamphetamine or 3, 4-methylenedioxymethamphetamine as described in Schedule I, in violation of this article commits the felony offense of trafficking in 3, 4-methylenedioxyamphetamine or 3, 4-methylenedioxymethamphetamine and, upon conviction thereof, shall be punished as follows:

- (1) If the quantity of such substance involved is 28 grams or more, but less than 200 grams, the person shall be sentenced to a mandatory minimum term of imprisonment of three years but not more than

30 years and shall pay a fine of not less than \$25,000.00 nor more than \$250,000.00;

(2) If the quantity of such substance involved is 200 grams or more, but less than 400 grams, the person shall be sentenced to a mandatory minimum term of imprisonment of five years but not more than 30 years and shall pay a fine of not less than \$50,000.00 nor more than \$250,000.00; and

(3) If the quantity of such substance involved is 400 grams or more, the person shall be sentenced to a mandatory minimum term of imprisonment of ten years but not more than 30 years and shall pay a fine of not less than \$100,000.00 nor more than \$250,000.00. (Code 1981, § 16-13-31.1, enacted by Ga. L. 2004, p. 1070, § 1; Ga. L. 2007, p. 47, § 16/SB 103.)

JUDICIAL DECISIONS

Sufficient evidence to support conviction for trafficking MDMA. — With regard to a defendant's convictions for possession of marijuana with the intent to distribute, trafficking in 4-Methylenedioxymethamphetamine, commonly known as ecstasy, trafficking in cocaine, and possession of a firearm during the commission of a crime, there was sufficient evidence to support the defendant's conviction for possession of the contraband, which was found in a backpack, based on the strong odor of marijuana coming from the vehicle in which the defendant was a passenger, the defendant's suspicious and nervous behavior, the defendant's joint living arrangement with two other defendants, the defendant's possession of ammunition for another one of the defendant's weapons, and the fact that the defendant was, at

times, within arm's reach of the backpack, which showed an intent and power to exercise joint control over the backpack and the drugs found therein; likewise, there was sufficient evidence to support the trafficking charges based on the amounts of the contraband found; and, there was sufficient evidence to support the firearm possession charge since the defendant was found in possession of a magazine that fit the gun located within arm's reach. However, considering that there were four people in the vehicle, the court found that the state's evidence was insufficient to exclude the reasonable hypothesis that the marijuana was intended for personal use therefore, the conviction for the intent to distribute marijuana was reduced to possession. *Vines v. State*, 296 Ga. App. 543, 675 S.E.2d 260 (2009).

16-13-32. Transactions in drug related objects; forfeitures and penalties.

(a) As used in this Code section, the term:

(1) "Drug related object" means any instrument, device, or object which is designed or marketed as useful primarily for one or more of the following purposes:

(A) To inject, ingest, inhale, or otherwise introduce marijuana or a controlled substance into the human body;

(B) To enhance the effect of marijuana or a controlled substance on the human body;

(C) To test the strength, effectiveness, or purity of marijuana or a controlled substance;

(D) To process or prepare marijuana or a controlled substance for introduction into the human body;

(E) To conceal any quantity of marijuana or a controlled substance; or

(F) To contain or hold marijuana or a controlled substance while it is being introduced into the human body.

(2) "Knowing" means either actual or constructive knowledge of the drug related nature of the object; and a person or corporation has constructive knowledge of the drug related nature of the object if he or it has knowledge of facts which would put a reasonable and prudent person on notice of the drug related nature of the object.

(b) It shall be unlawful for any person or corporation, knowing the drug related nature of the object, to sell, lend, rent, lease, give, exchange, or otherwise distribute to any person any drug related object. It shall also be unlawful for any person or corporation, knowing the drug related nature of the object, to display for sale, or possess with the intent to distribute any drug related object. Unless stated within the body of the advertisement or notice that the object that is advertised or about which information is disseminated is not available for distribution of any sort in this state, it shall be unlawful for any person or corporation, knowing the drug related nature of the object, to distribute or disseminate in any manner to any person any advertisement of any kind or notice of any kind which gives information, directly or indirectly, on where, how, from whom, or by what means any drug related object may be obtained or made.

(c) It shall be unlawful for any person or corporation, other than a licensed pharmacist, a pharmacy intern or pharmacy extern as defined in Code Section 26-4-5, or a practitioner licensed to dispense dangerous drugs, to sell, lend, rent, lease, give, exchange, or otherwise distribute to any person a hypodermic syringe or needle designed or marketed primarily for human use. It shall be an affirmative defense that the hypodermic syringe or needle was marketed for a legitimate medical purpose.

(d) For a first offense, any person or corporation which violates any provision of this Code section shall be guilty of a misdemeanor. For a second offense, the defendant shall be guilty of a misdemeanor of a high and aggravated nature. For a third or subsequent offense, the defendant shall be guilty of a felony and, upon conviction thereof, shall be imprisoned for not less than one year nor more than five years and shall be fined not more than \$5,000.00.

(e) All instruments, devices, and objects which are distributed or possessed in violation of this Code section are declared to be contraband.

(f) After conviction and after all direct appeals from the conviction have been exhausted, any instruments, devices, or objects which are the subject of prosecution under this Code section may be destroyed by the state or any county or municipality thereof without court order.

(g) Any instruments, devices, or objects which are seized after July 1, 1980, on condemnation as being distributed or possessed in violation of this Code section and which are not made the subject of prosecution under this Code section may be destroyed by the state or any county or municipality thereof if within 90 days after such seizures are made, the district attorney or the solicitor-general of any court that has jurisdiction to try misdemeanors in the county where the seizure occurred shall institute condemnation proceedings in the court by petition, a copy of which shall be served upon the owner of the seized items, if known; and if the owner is unknown, notice of such proceedings shall be published once a week for two weeks in the newspaper in which the sheriff's advertisements are published. The petition shall allege that the seized items were distributed or possessed in violation of this Code section; and, if no defense is filed within 30 days from the filing of the petition, judgment by default shall be entered by the court at chambers, and the court shall order the seized items to be destroyed; otherwise, the case shall proceed as other civil cases in the court. Should the state prove, by a preponderance of the evidence, that the seized items were distributed or possessed in violation of this Code section, the court shall order the seized items to be destroyed. (Code 1933, § 79A-811.1, enacted by Ga. L. 1978, p. 2237, § 1; Ga. L. 1980, p. 1288, § 1; Ga. L. 1996, p. 748, § 13; Ga. L. 2004, p. 488, § 2.)

JUDICIAL DECISIONS

Constitutionality. — See *High Ol' Times, Inc. v. Busbee*, 673 F.2d 1225 (11th Cir. 1982).

Definition of "drug related objects" in O.C.G.A. § 16-13-32 provides adequate notice of the persons covered and the conduct proscribed and therefore does not render the section void for vagueness. *High Ol' Times, Inc. v. Busbee*, 673 F.2d 1225 (11th Cir. 1982).

Explicit standards necessary. — If arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. *High Ol' Times, Inc. v. Busbee*, 515 F. Supp. 176 (N.D. Ga. 1980), rev'd on

other grounds, 673 F.2d 1225 (11th Cir. 1982).

Section not repealed by implication. — Despite the almost identical caption and punishment provisions, the enactment of O.C.G.A. § 16-13-32.1 was intended to be in addition to, rather than a substitute for, the existing statute (O.C.G.A. § 16-13-32); thus, O.C.G.A. § 16-13-32.1 did not repeal O.C.G.A. § 16-13-32 by implication. *State v. Gill*, 173 Ga. App. 848, 328 S.E.2d 561 (1985).

Notice of proceeding to condemn currency. — Because O.C.G.A. § 16-13-32 does not require the notice of proceedings by publication to specify the

time within which an answer must be filed, and the party reading the notice is charged with knowledge of the legal requirements, where the plaintiff did nothing to confirm time had expired or rectify the absence of a response, plaintiff could not show prejudice other than what was self-inflicted through lack of diligence, and plaintiff's out-of-time answer was untimely. *Ragland v. State*, 235 Ga. App. 830, 510 S.E.2d 587 (1998).

Digital scales. — Given a police officer's testimony that the drugs found at the scene came from a bag which the defendant removed from a pants pocket, the jury was authorized to find that the defendant trafficked in cocaine, possessed cocaine with intent to distribute, and possessed less than one ounce of marijuana;

moreover, the amount of cocaine at issue, as well as the defendant's possession of digital scales typically used to weigh drugs for distribution, permitted the jury to discount the defendant's own testimony and find an intention to distribute the drugs. *Lipsey v. State*, 287 Ga. App. 835, 652 S.E.2d 870 (2007).

O.C.G.A. § 16-13-32 does not exclude certain seeds, fiber, and oil from a marijuana plant as contraband. *Lang v. State*, 165 Ga. App. 576, 302 S.E.2d 683, cert. denied, 464 U.S. 937, 104 S. Ct. 346, 78 L. Ed. 2d 312 (1983).

Cited in *High Ol' Times, Inc. v. Busbee*, 449 F. Supp. 364 (N.D. Ga. 1978); *High Ol' Times, Inc. v. Busbee*, 456 F. Supp. 1035 (N.D. Ga. 1978); *High Ol' Times, Inc. v. Busbee*, 621 F.2d 135 (5th Cir. 1980).

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, *Drugs and Controlled Substances*, §§ 19 et seq., 27, 47 et seq.

C.J.S. — 28 C.J.S., *Drugs and Narcotics*, §§ 274 et seq., 285. 28A C.J.S., *Drugs and Narcotics*, § 342 et seq.

ALR. — Conviction of possession of illicit drugs found in premises of which defendant was in nonexclusive possession, 56 ALR3d 948.

Prosecutions based upon alleged illegal possession of instruments to be used in violation of narcotics laws, 92 ALR3d 47.

Forfeitability of property held in marital estate under Uniform Controlled Substances Act or similar statute, 84 ALR4th 620.

Construction and application of state drug paraphernalia acts, 23 ALR6th 307.

What constitutes establishment of prima facie case for forfeiture of real property traceable to proceeds from sale of controlled substances under § 511(a)(6) of Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 USCA § 881(a)(6)), 146 ALR Fed. 597.

16-13-32.1. Transactions in drug related objects; evidence as to whether object is drug related; forfeitures and penalties.

(a) It shall be unlawful for any person or corporation to sell, rent, lease, give, exchange, otherwise distribute, or possess with intent to distribute any object or materials of any kind which such person or corporation intends to be used for the purpose of planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body marijuana or a controlled substance.

(b) Unless stated within the body of the advertisement or notice that the object or materials that are advertised or about which information

is disseminated are not available for distribution of any sort in this state, it shall be unlawful for any person or corporation to sell, rent, lease, give, exchange, distribute, or possess with intent to distribute any advertisement of any kind or notice of any kind which gives information, directly or indirectly, on where, how, from whom, or by what means any object or materials may be obtained or made, which object or materials such person or corporation intends to be used for the purpose of planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body marijuana or a controlled substance.

(c) In determining whether any object or materials are intended for any of the purposes listed in subsections (a) and (b) of this Code section, a court or other authority shall consider all logically relevant factors. In a trial under this Code section, any evidence admissible on this question under the rules of evidence shall be admitted. Subject to the rules of evidence, when they are the object of an offer of proof in a court proceeding, the following factors are among those that should be considered by a court or other authority on this question:

- (1) Statements by an owner or anyone in control of the object or materials;
- (2) Instructions provided with the object or materials;
- (3) Descriptive materials accompanying the object or materials;
- (4) National and local advertising or promotional materials concerning the object or materials;
- (5) The appearance of, and any writing or other representations appearing on, the object or materials;
- (6) The manner in which the object or materials are displayed for sale or other distribution;
- (7) Expert testimony concerning the object or materials; and
- (8) Any written or pictorial materials which are present in the place where the object is located.

(d) For a first offense, any person or corporation which violates any provision of this Code section shall be guilty of a misdemeanor. For a second offense, the defendant shall be guilty of a misdemeanor of a high and aggravated nature. For a third or subsequent offense, the defendant shall be guilty of a felony and, upon conviction thereof, shall be imprisoned for not less than one year nor more than five years and shall be fined not more than \$5,000.00.

(e) All objects and materials which are distributed or possessed in violation of this Code section are declared to be contraband and shall be forfeited according to the procedure described in Code Section 16-13-49. (Code 1933, § 79A-811.2, enacted by Ga. L. 1981, p. 180, § 1; Ga. L. 1985, p. 149, § 16.)

Law reviews. — For note on the Model Drug Paraphernalia Act and the Head

Shop Industry, see 16 Ga. L. Rev. 137 (1981).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

CONSTITUTIONALITY

General Consideration

Section 16-13-32 not repealed by implication. — Despite the almost identical caption and punishment provisions, the enactment of O.C.G.A. § 16-13-32.1 was intended to be in addition to, rather than a substitute for, the existing statute (O.C.G.A. § 16-13-32); thus, § 16-13-32.1 did not repeal § 16-13-32 by implication. *State v. Gill*, 173 Ga. App. 848, 328 S.E.2d 561 (1985).

State has power and authority to enact properly drawn drug paraphernalia law pursuant to the state's police power. *Windfaire, Inc. v. Busbee*, 523 F. Supp. 868 (N.D. Ga. 1981).

Actions constituting violation. — Person violates O.C.G.A. § 16-13-32.1 only if the person personally intends object to be used for purpose prohibited by section. *Windfaire, Inc. v. Busbee*, 523 F. Supp. 868 (N.D. Ga. 1981).

Evidence was sufficient for a jury to find defendant guilty of ingesting methamphetamine as defendant leased a house in which a widespread methamphetamine manufacturing operation took place, which created a strong chemical smell immediately apparent upon entering the house, and defendant tested positive for methamphetamine in defendant's system, circumstantially linking the defendant to the manufacturing process and undermining the claim that the defendant was unaware of the activity. *Kirby v. State*, 275 Ga. App. 216, 620 S.E.2d 459 (2005).

Constitutionality

O.C.G.A. § 16-13-32.1 is not a bill of attainder nor does the statute deny "head shops" equal protection of the law. *Windfaire, Inc. v. Busbee*, 523 F. Supp. 868 (N.D. Ga. 1981).

Effect on "head shops." — O.C.G.A. § 16-13-32.1 is not unconstitutional on theory that the statute may be enforced only against "head shops." The statute applies to anyone who sells or advertises for sale objects which are drug-related. *Windfaire, Inc. v. Busbee*, 523 F. Supp. 868 (N.D. Ga. 1981).

O.C.G.A. § 16-13-32.1 does not violate U.S. Const., Art. I, Sec. 8, Cl. 3 (Commerce Clause), as the statute serves a legitimate public interest, and the statute's impact on interstate commerce is minimal inasmuch as the statute affects only objects connected with unlawful intent. Burden of new law on interstate commerce is not excessive. *Windfaire, Inc. v. Busbee*, 523 F. Supp. 868 (N.D. Ga. 1981).

Advertisement provision of O.C.G.A. § 16-13-32.1 is not unconstitutional under U.S. Const., amend. 1, as it does not prohibit speech which describes or glorifies the drug culture. *Windfaire, Inc. v. Busbee*, 523 F. Supp. 868 (N.D. Ga. 1981).

Void for vagueness test is satisfied as to "sale" and "advertisement" provisions set forth in O.C.G.A. § 16-13-32.1. *Windfaire, Inc. v. Busbee*,

Constitutionality (Cont'd)

523 F. Supp. 868 (N.D. Ga. 1981).

Constitutionality of O.C.G.A.

§ 16-13-32.1(e), see *Windfaire, Inc. v. Busbee*, 523 F. Supp. 868 (N.D. Ga. 1981).

RESEARCH REFERENCES

C.J.S. — 28 C.J.S., *Drugs and Narcotics*, § 263 et seq.

ALR. — *Construction and application*

of state drug paraphernalia acts, 23 ALR6th 307.

16-13-32.2. Possession and use of drug related objects.

(a) It shall be unlawful for any person to use, or possess with the intent to use, any object or materials of any kind for the purpose of planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body marijuana or a controlled substance.

(b) Any person or corporation which violates any provision of this Code section shall be guilty of a misdemeanor. (Code 1933, § 79A-811.3, enacted by Ga. L. 1981, p. 180, § 2.)

Law reviews. — For note on the Model Drug Paraphernalia Act and the Head

Shop Industry, see 16 Ga. L. Rev. 137 (1981).

JUDICIAL DECISIONS

Section is void for vagueness. — As there are no standards to guide those charged with enforcing the law, and there exists the very real possibility of discriminatory and arbitrary enforcement, O.C.G.A. § 16-13-32.2 is accordingly found to be void for vagueness, and it is declared unconstitutional. *Windfaire, Inc. v. Busbee*, 523 F. Supp. 868 (N.D. Ga. 1981).

No fatal variance between indictment and evidence at trial. — With respect to a charge against the defendant of possession of a drug-related object, in violation of O.C.G.A. § 16-13-32.2, there was no fatal variance between the charge in the indictment and the evidence offered at trial, although the indictment referred to a crack cocaine smoking device and the evidence at trial showed that the defendant possessed a filter for such device, which was a mere component of such a device; the defendant was sufficiently apprised of the charge and there was no

danger of further prosecution. *Holloway v. State*, 297 Ga. App. 81, 676 S.E.2d 445 (2009).

Evidence of intent. — Admission of a photocopy of a syringe which was subsequently taken from defendant and subsequently destroyed by the police did not deprive defendant of the right to an independent examination of critical evidence because defendant admitted possessing the syringe; thus, the only disputed element of the offense was defendant's intent to use it. *Rogers v. State*, 224 Ga. App. 359, 480 S.E.2d 368 (1997).

"Crack pipe" without crack residue. — Possession of a "crack pipe" is possession of a drug related object in contravention of O.C.G.A. § 16-13-32.2, regardless of whether there is any crack residue in the pipe. *Jones v. State*, 237 Ga. App. 847, 515 S.E.2d 841 (1999).

Methamphetamine pipe found in pat-down admissible. — Statement by a defendant who had been stopped for

speeding that the defendant had a knife, and the defendant's overly-nervous demeanor, authorized a trooper to pat the defendant down for the trooper's safety. A "plain feel" of an apparent methamphetamine pipe in the defendant's pocket authorized the trooper to remove the pipe; therefore, the pipe was admissible. *Hicks v. State*, 293 Ga. App. 745, 667 S.E.2d 715 (2008).

Methamphetamine pipe admissible. — Evidence was sufficient to support the defendant's conviction for possession of drug related objects in violation of O.C.G.A. § 16-13-32.2 because a deputy with experience investigating drug crimes testified that a pipe found on the defendant was used for smoking methamphetamine. *McGhee v. State*, 303 Ga. App. 297, 692 S.E.2d 864 (2010).

Merger of offenses. — Defendant's conviction for possession of drug-related objects merged as a matter of fact into defendant's felony conviction for possession of cocaine. *Reddick v. State*, 249 Ga. App. 678, 549 S.E.2d 151 (2001), cert. denied, 2001 Ga. LEXIS 802 (Oct. 1, 2001).

Felony sentence vacated. — Defendant's felony sentence for possession of drug-related objects, a misdemeanor offense, was vacated as the state conceded the impropriety of the sentence. *Lewis v. State*, 268 Ga. App. 547, 602 S.E.2d 278 (2004).

In a prosecution for the possession of tools for the commission of a crime, which was a felony, while the evidence presented against the defendant was sufficient to support the jury's verdict, because the defendant's conduct could also have been charged as a misdemeanor offense of possession of a drug related object, pursuant

to O.C.G.A. § 16-13-32.2(a) and the rule of lenity, the felony conviction was reversed, and the matter was remanded for a resentencing on the misdemeanor offense. *Washington v. State*, 283 Ga. App. 570, 642 S.E.2d 199 (2007).

Conflicts in testimony were for jury to resolve. — There was sufficient evidence to support a conviction for possession of methamphetamine and possession of drug related objects when the defendant admitted telling officers that the defendant owned a pipe that had methamphetamine residue on the pipe, but said that the admission had been made under pressure and that a purse in which drug-related items were found was a "community purse" used by employees of the convenience store where the defendant worked; it was for the jury to resolve conflicts in the testimony and to weigh the evidence. *Doyal v. State*, 287 Ga. App. 667, 653 S.E.2d 52 (2007).

Evidence sufficient to support conviction. — There was sufficient evidence to support convictions for trafficking in cocaine and possession of a drug-related object, in violation of O.C.G.A. §§ 16-13-31(a)(1) and 16-13-32.2, against the defendant as the defendant's van contained items used as drug pipe filters, the defendant's passenger had dropped crack cocaine on the ground just prior to being apprehended, both individuals had large amounts of cash on them, and the defendant had a criminal history of similar drug-related conduct. *Holloway v. State*, 297 Ga. App. 81, 676 S.E.2d 445 (2009).

Cited in *Lang v. State*, 165 Ga. App. 576, 302 S.E.2d 683 (1983); *Whisenant v. State*, 239 Ga. App. 259, 521 S.E.2d 204 (1999); *Lipsey v. State*, 287 Ga. App. 835, 652 S.E.2d 870 (2007); *Maloy v. State*, 293 Ga. App. 648, 667 S.E.2d 688 (2008).

RESEARCH REFERENCES

ALR. — Construction and application of state drug paraphernalia acts, 23 ALR6th 307.

16-13-32.3. Use of communication facility in committing or facilitating commission of act which constitutes felony under chapter; penalty.

(a) It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under this chapter. Each separate use of a communication facility shall be a separate offense under this Code section. For purposes of this Code section, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, computer or computer network, and all other means of communication.

(b) Any person who violates subsection (a) of this Code section shall be punished by a fine of not more than \$30,000.00 or by imprisonment for not less than one nor more than four years, or both. (Code 1981, § 16-13-32.3, enacted by Ga. L. 1982, p. 2359, § 1; Ga. L. 1995, p. 574, § 1.)

Law reviews. — For survey article on criminal law and procedure, see 34 Mercer L. Rev. 89 (1982).

For note on the 1995 amendment of this Code section, see 12 Georgia St. U.L. Rev. 130 (1995).

JUDICIAL DECISIONS

Participation in later drug sale irrelevant to charge under statute. — When a defendant was charged with using a communication facility (telephone) to facilitate a sale of cocaine, it was immaterial to guilt under O.C.G.A. § 16-13-32.3 that the defendant did not participate in the subsequent sale of cocaine that the defendant had initially facilitated; the telephone call in which the defendant participated clearly aided in the sale of the cocaine. Thus, the evidence was sufficient for a rational trier of fact to find the defendant guilty of the offense charged beyond a reasonable doubt. *Hunt v. State*, 196 Ga. App. 694, 396 S.E.2d 802 (1990).

Use of a telephone by defendant to arrange with another to pick up packages of drugs and deliver them to defendant's apartment was sufficient evidence that defendant used a communication device to obtain possession of more than one ounce of marijuana. *Russell v. State*, 243 Ga. App. 378, 532 S.E.2d 137 (2000).

Use of a pager. — Because the defen-

dant delivered cocaine to an informant and used a pager to aid in the cocaine's distribution, the evidence was sufficient to find the defendant guilty of distributing cocaine and using a communication facility to facilitate a violation of the Georgia Controlled Substance Act, specifically violations of O.C.G.A. §§ 16-13-21(11) and 16-13-32.3(a). *Capers v. State*, 273 Ga. App. 427, 615 S.E.2d 126 (2005).

Venue not established. — State failed to prove venue on a count for unlawful use of a communication facility; the indictment alleged that the defendant had used a cellular telephone in Long County, but the state had not set forth any evidence that the defendant used the telephone there. *Maldonado v. State*, 284 Ga. App. 26, 643 S.E.2d 316 (2007).

With regard to a defendant's trial on various drug charges, the defendant's convictions on three counts of using a communication device to commit or facilitate the commission of a designated felony, in violation of O.C.G.A. § 16-13-32.3, were re-

versed because the state failed to prove venue since the state submitted no proof that three related phone calls made on September 23, 24, and 25, 2003, were made in Newton County, Georgia, wherein prosecution was sought. *Rogers v. State*, 298 Ga. App. 895, 681 S.E.2d 693 (2009).

Evidence insufficient for conviction. — Transcripts of monitored telephone conversations between the defendant and other individuals named in the indictment were insufficient to support defendant's convictions of using a communications facility to commit, cause, or facilitate a violation of the Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., since the state introduced no evidence tending to suggest that any overt act was ever carried out in furtherance of the drug transaction which had been discussed. *Kelleher v. State*, 185 Ga. App. 774, 365 S.E.2d 889 (1988).

When there was no direct evidence the defendant made a telephone call to arrange the delivery of cocaine as charged in the indictment, the circumstantial evidence was held to be insufficient as a matter of law to exclude other reasonable inferences. *Britt v. State*, 202 Ga. App. 689, 415 S.E.2d 492 (1992).

Evidence sufficient for conviction.

— Because: (1) the defendant failed to sufficiently prove an entrapment defense, and hence, the need for disclosure of an informant's identity; (2) no error resulted in refusing to strike a juror for cause; and (3) the trial court's entrapment instruction was legally correct and did not mislead the jury, the defendant's convictions for trafficking in cocaine, in violation of O.C.G.A. § 16-13-31(a), possession of cocaine with intent to distribute, contrary to O.C.G.A. § 16-13-30(b), and two counts of use of communication facilities in committing a felony drug offense, under O.C.G.A. § 16-13-32.3, were affirmed on appeal. *Griffiths v. State*, 283 Ga. App. 176, 641 S.E.2d 169 (2006).

Recorded conversations between an informant and a defendant proved the defendant's violation of O.C.G.A. § 16-13-32.3, the use of communication facility in committing a felony. There was circumstantial evidence that the defendant was the participant in the phone calls, and the phone calls set up drug buys between the informant and the defendant. *Kimble v. State*, 301 Ga. App. 237, 687 S.E.2d 242 (2009).

Cited in *Brannon v. State*, 243 Ga. App. 28, 530 S.E.2d 761 (2000); *Thomas v. State*, 299 Ga. App. 235, 682 S.E.2d 325 (2009).

16-13-32.4. Manufacturing, distributing, dispensing, or possessing controlled substances in, on, or near public or private schools.

(a) It shall be unlawful for any person to manufacture, distribute, dispense, or possess with intent to distribute a controlled substance or marijuana in, on, or within 1,000 feet of any real property owned by or leased to any public or private elementary school, secondary school, or school board used for elementary or secondary education.

(b) Any person who violates or conspires to violate subsection (a) of this Code section shall be guilty of a felony and upon conviction shall receive the following punishment:

(1) Upon a first conviction, imprisonment for not more than 20 years or a fine of not more than \$20,000.00, or both; or

(2) Upon a second or subsequent conviction, imprisonment for not less than five years nor more than 40 years or a fine of not more than \$40,000.00, or both. It shall be mandatory for the court to impose a

minimum sentence of five years which may not be suspended unless otherwise provided by law.

A sentence imposed under this Code section shall be served consecutively to any other sentence imposed.

(c) A conviction arising under this Code section shall not merge with a conviction arising under any other provision of this article.

(d) It shall be no defense to a prosecution for a violation of this Code section that:

(1) School was or was not in session at the time of the offense;

(2) The real property was being used for other purposes besides school purposes at the time of the offense; or

(3) The offense took place on a school vehicle.

(e) In a prosecution under this Code section, a map produced or reproduced by any municipal or county agency or department for the purpose of depicting the location and boundaries of the area on or within 1,000 feet of the real property of a school board or a private or public elementary or secondary school that is used for school purposes, or a true copy of the map, shall, if certified as a true copy by the custodian of the record, be admissible and shall constitute prima-facie evidence of the location and boundaries of the area, if the governing body of the municipality or county has approved the map as an official record of the location and boundaries of the area. A map approved under this Code section may be revised from time to time by the governing body of the municipality or county. The original of every map approved or revised under this subsection or a true copy of such original map shall be filed with the municipality or county and shall be maintained as an official record of the municipality or county. This subsection shall not preclude the prosecution from introducing or relying upon any other evidence or testimony to establish any element of this offense. This subsection shall not preclude the use or admissibility of a map or diagram other than the one which has been approved by the municipality or county.

(f) A county school board may adopt regulations requiring the posting of signs designating the areas within 1,000 feet of school boards and private or public elementary and secondary schools as "Drug-free School Zones."

(g) It is an affirmative defense to prosecution for a violation of this Code section that the prohibited conduct took place entirely within a private residence, that no person 17 years of age or younger was present in such private residence at any time during the commission of the offense, and that the prohibited conduct was not carried on for purposes

of financial gain. Nothing in this subsection shall be construed to establish an affirmative defense with respect to any offense under this chapter other than the offense provided for in subsection (a) of this Code section. (Code 1981, § 16-13-32.4, enacted by Ga. L. 1990, p. 1097, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1990, “\$20,000.00” was substituted for “\$20,000” in paragraph (b)(1) and “\$40,000.00” was substituted for “\$40,000” in paragraph (b)(2).

Editor’s notes. — Ga. L. 1990, p. 1097, § 2, not codified by the General Assembly, provides that this Code section shall apply to criminal offenses committed on or after July 1, 1990.

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Evidence of selling controlled substance sufficient. — When a police officer set up surveillance of an area located within 1,000 feet of an elementary school and 1,000 feet of a public housing project using a video camera, observed the defendant sell cocaine or marijuana in five transactions, and described the buyers to other police officers who apprehended the buyers and found the buyers in possession of the drugs which the defendant had sold the buyers, the videotape of the transactions and the testimony of the observing police officer along with the laboratory evidence regarding the drugs that were recovered from the various buyers was sufficient to sustain defendant’s convictions under the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., on five counts of selling a controlled substance and additional counts of selling the drugs within 1,000 feet of a school and selling the drugs within 1,000 feet of a public housing project. *Robinson v. State*, 259 Ga. App. 595, 578 S.E.2d 235 (2003).

Sufficient evidence for conviction. — Evidence held sufficient for possessing cocaine, possessing cocaine within 1,000 feet of a housing project, and attempted bribery, where police officers observed defendant engaging in what appeared to be a drug transaction, they thereafter found cocaine on the sidewalk where defendant had been standing and cocaine in defendant’s pockets, and defendant told a police officer who was counting defendant’s money to take it and defendant’s watch, and that defendant would pay the officer more in a week if the officer would let defendant go. *Hester v. State*, 261 Ga. App. 614, 583 S.E.2d 274 (2003).

Evidence that when a buyer went to the defendant’s residence, the defendant had cocaine, which defendant then sold to the buyer, was sufficient to prove the elements of possession with intent to distribute for purposes of finding violations of O.C.G.A. §§ 16-13-32.4(a) and 16-13-32.5(a). *Smith v. State*, 278 Ga. App. 315, 628 S.E.2d 722 (2006).

Defendant’s conviction of possession of drugs with intent to distribute within 1,000 feet of a school in violation of O.C.G.A. § 16-13-32.4(a) was supported by sufficient evidence in the form of the testimony of police who searched the defendant’s home, of the evidence custodian, of the forensic chemist who tested the drugs, and of a house mate who witnessed the defendant selling drugs. *Harkins v. State*, 281 Ga. App. 512, 636 S.E.2d 698 (2006).

In the possession of drugs with intent to distribute within 1,000 feet of a school in violation of O.C.G.A. § 16-13-32.4(a) case, the defendant’s argument, that the evidence supported a reasonable hypothesis of innocence because the evidence showed that the prohibited conduct took place entirely within a private residence, failed; the reasonable hypothesis rule was inapplicable since there was direct evidence of the defendant’s guilt in the form of admissions by the defendant and the defendant’s boyfriend and in the form of testimony by the defendant’s house mate who witnessed the defendant selling drugs. *Harkins v. State*, 281 Ga. App. 512, 636 S.E.2d 698 (2006).

Sufficient evidence supported the defendant’s convictions of trafficking in cocaine,

possession of marijuana with intent to distribute, and possession of cocaine with intent to distribute within 1,000 feet of a school, despite an argument on appeal that no evidence of either actual or constructive possession was presented, as: (1) sufficient additional evidence, albeit circumstantial, tied the defendant to said crimes and established more than the defendant's mere presence to the drugs seized; and (2) the proved facts excluded any reasonable hypotheses that a crime could have been committed by anyone else. *Slaughter v. State*, 282 Ga. App. 276, 638 S.E.2d 417 (2006).

There was sufficient evidence to support convictions of possession of cocaine with intent to distribute under O.C.G.A. § 16-13-30(b), possession of cocaine with intent to distribute within 1,000 feet of a housing project under O.C.G.A. § 16-13-32.5(b), and possession of cocaine with intent to distribute within 1,000 feet of a public school under O.C.G.A. § 16-13-32.4(a), based on the traffic to and from the defendant's trailer an investigator witnessed, the hand-to-hand exchanges the investigator witnessed, the 1.66 grams of crack cocaine, broken into pieces, that was recovered after one hand-to-hand exchange, and the fact that the trailer park was within 1,000 feet of a housing project and a public school. *Smith v. State*, 291 Ga. App. 353, 662 S.E.2d 176 (2008).

Given an alternative school's security officer's actual observation of a hand-to-hand exchange from a juvenile to another student at the school and the discovery of marijuana in the recipient's hand immediately thereafter, the only reasonable hypothesis was that the juvenile had just possessed the marijuana satisfying O.C.G.A. § 24-4-6. In the Interest of T. M., 303 Ga. App. 322, 693 S.E.2d 574 (2010).

Insufficient evidence. — Evidence that juvenile was in the same dressing room with another boy and departed the area just before marijuana was discovered on the other boy and that the juvenile was later found to have \$269 in the juvenile's possession was not sufficient to support a delinquency adjudication for violation of O.C.G.A. § 16-13-32.4. In re A.D.C., 228 Ga. App. 829, 493 S.E.2d 38 (1997).

Jury instruction. — Defendant was not entitled to an affirmative defense jury instruction under O.C.G.A. § 16-13-32.4(g), relating to prohibited conduct occurring entirely inside a private residence, in a possession of drugs with intent to distribute within 1,000 feet of a school in violation of O.C.G.A. § 16-13-32.4(a) case; there was no evidence that the affirmative defense was applicable as there was no evidence that the drug possession was not for the purpose of financial gain. *Harkins v. State*, 281 Ga. App. 512, 636 S.E.2d 698 (2006).

RESEARCH REFERENCES

ALR. — Validity, construction, and application of state statutes prohibiting sale or possession of controlled substances within specified distance of schools, 27 ALR5th 593.

Validity, construction, and application of state statutes enhancing penalty for sale or possession of controlled substances within specified distance of playgrounds, 23 ALR6th 679.

16-13-32.5. Manufacturing, distributing, dispensing, or possessing controlled substance, marijuana, or counterfeit substance near park or housing project; nonmerger of offenses; evidence of location and boundaries; posting; affirmative defenses.

(a) It shall be unlawful for any person to manufacture, distribute, dispense, or possess with intent to distribute a controlled substance or marijuana or a counterfeit substance in, on, or within 1,000 feet of any

real property which has been dedicated and set apart by the governing authority of any municipality, county, state authority, or the state for use as a park, playground, recreation center, or for any other recreation purposes, unless the manufacture, distribution, or dispensing is otherwise allowed by law.

(b) It shall be unlawful for any person to manufacture, distribute, dispense, or possess with intent to distribute a controlled substance or marijuana or a counterfeit substance in, on, or within 1,000 feet of any real property of any publicly owned or publicly operated housing project, unless the manufacture, distribution, or dispensing is otherwise allowed by law. For the purposes of this Code section, the term "housing project" means any facilities under the jurisdiction of a housing authority which constitute single or multifamily dwelling units occupied by low and moderate-income families pursuant to Chapter 3 of Title 8.

(c) Any person who violates or conspires to violate subsection (a) or (b) of this Code section shall be guilty of a felony and upon conviction shall receive the following punishment:

(1) Upon a first conviction, imprisonment for not more than 20 years or a fine of not more than \$20,000.00, or both; or

(2) Upon a second or subsequent conviction, imprisonment for not less than five years nor more than 40 years or a fine of not more than \$40,000.00, or both. It shall be mandatory for the court to impose a minimum sentence of five years which may not be suspended unless otherwise provided by law.

A sentence imposed under this Code section shall be served consecutively to any other sentence imposed.

(d) A conviction arising under this Code section shall not merge with a conviction arising under any other provision of this article.

(e) In a prosecution under this Code section, a map produced or reproduced by any municipal or county agency or department for the purpose of depicting the location and boundaries of the area on or within 1,000 feet of the real property of any publicly owned or publicly operated housing project or the real property set apart for use as a park, playground, recreation center, or for any other recreation purposes, or a true copy of the map, shall, if certified as a true copy by the custodian of the record, be admissible and shall constitute prima-facie evidence of the location and boundaries of the area, if the governing body of the municipality or county has approved the map as an official record of the location and boundaries of the area. A map approved under this Code section may be revised from time to time by the governing body of the municipality or county. The original of every map approved or revised

under this subsection or a true copy of such original map shall be filed with the municipality or county and shall be maintained as an official record of the municipality or county. This subsection shall not preclude the prosecution from introducing or relying upon any other evidence or testimony to establish any element of this offense. This subsection shall not preclude the use or admissibility of a map or diagram other than the one which has been approved by the municipality or county.

(f) The governing authority of a municipality or county may adopt regulations requiring the posting of signs designating the areas within 1,000 feet of any lands or buildings set apart for use as parks, playgrounds, recreation centers, or any other recreation purposes as “Drug-free Recreation Zones” and designating the areas within 1,000 feet of the real property of any publicly owned or publicly operated housing project as “Drug-free Residential Zones.”

(g) It is an affirmative defense to prosecution for a violation of this Code section that the prohibited conduct took place entirely within a private residence, that no person 17 years of age or younger was present in such private residence at any time during the commission of the offense, and that the prohibited conduct was not carried on for purposes of financial gain. Nothing in this subsection shall be construed to establish an affirmative defense with respect to any offense under this chapter other than the offense provided for in subsections (a) and (b) of this Code section. (Code 1981, § 16-13-32.5, enacted by Ga. L. 1992, p. 2043, § 1; Ga. L. 2000, p. 1215, § 1; Ga. L. 2008, p. 600, § 1/SB 453.)

Law reviews. — For annual survey article discussing developments in criminal law, see 51 Mercer L. Rev. 209 (1999).

For note on 1992 enactment of this Code section, see 9 Georgia St. U.L. Rev. 212 (1992).

JUDICIAL DECISIONS

Construed with O.C.G.A. § 16-13-30. — Convictions for selling cocaine (O.C.G.A. § 16-13-30) and selling cocaine within 1000 feet of a public housing project (O.C.G.A. § 16-13-32.5) did not merge because the latter statute contains a specific non-merger provision and the intent thereof is simply to increase the punishment for violating both statutes. *Harper v. State*, 213 Ga. App. 611, 445 S.E.2d 300 (1994).

Defendant’s convictions for possession of cocaine with intent to distribute and possession of a controlled substance within 1,000 feet of a housing project, in violation of O.C.G.A. § 16-13-30(b) and O.C.G.A. § 16-13-32.5(b), were based on sufficient evidence after the state proved

by circumstantial evidence pursuant to O.C.G.A. § 24-4-6 that the defendant had been walking back and forth to an overturned bucket when people approached from the street in what appeared to be drug transactions, and the drugs were found under the bucket; there was evidence that the amount of drugs recovered were more than one would use for personal use, such that the amount indicated an intent to distribute, and there was also evidence indicating the proximity of the bucket to a nearby public housing complex. *Reason v. State*, 283 Ga. App. 608, 642 S.E.2d 236 (2007).

Proof of violation. — When the prosecution did not employ the statutorily authorized method to establish prima fa-

cie the location and boundaries of any housing projects, but relied on the testimony of an undercover officer that a sale of crack cocaine took place near “numerous red brick buildings located around a common, grassy area” that “we just knew that it was a — it was city — it was public — it was city owned”, such evidence was not sufficient to support a conviction for a violation of O.C.G.A. § 16-13-32.5. *Johnson v. State*, 214 Ga. App. 77, 447 S.E.2d 74 (1994).

Facts required to be established by O.C.G.A. § 16-13-32.5 could be proved by the testimony of police officers familiar with the area and expressly assigned to patrol public housing areas. *Menefee v. State*, 226 Ga. App. 725, 487 S.E.2d 489 (1997).

Trial court was not authorized to find the defendant intended to distribute the drugs since the state produced no evidence that the defendant had scales, guns, cash, drug packaging materials, or a large quantity of marijuana, and did not introduce any evidence of prior drug sales by the defendant, or any testimony that the defendant was observed selling or attempting to sell drugs. *Clark v. State*, 245 Ga. App. 267, 537 S.E.2d 742 (2000).

Trial court erred in convicting the defendant of selling cocaine within 1,000 feet of a housing project because there was no probative evidence that the cocaine sale took place within 1,000 feet of a public housing project property as required by O.C.G.A. § 16-13-32.5(b) since the prosecution did not rely on the authorized method under § 16-13-32.5(e) of using a map to establish that the cocaine sale occurred within 1,000 feet of a public housing project but relied on the testimony of the state’s witnesses to prove the public housing element of the offense; the only evidence that the apartment complex where the sale took place was occupied by low and moderate-income families was the testimony of an officer who was a member of the narcotics task force involved in the defendant’s arrest, but the officer admitted on cross-examination that the officer only knew that because that was what the officer had been told. *Quarterman v. State*, 305 Ga. App. 686, 700 S.E.2d 674 (2010).

Evidence to support eviction from public housing. — There was ample evidence from which a jury could find that a housing authority properly evicted a tenant from a public housing complex for the tenant’s child’s criminal activity as the child was arrested for violating O.C.G.A. § 16-13-32.5 after the child flagged down two undercover police officers and told them that the child could get the officers marijuana or crack cocaine from the apartments, which was consistent with the actions of a drug runner; that the child was not charged under that statute was irrelevant, as the lease allowed for termination for drug-related criminal activity without an arrest or conviction, and an attempted drug transaction, interrupted by the police, sufficed to show that the child had engaged in drug-related criminal activity by the required preponderance of the evidence, even though drugs were not found on the child when arrested. *Martinez v. Hous. Auth.*, 264 Ga. App. 282, 590 S.E.2d 245 (2003).

Evidence sufficient for conviction. — See *Tate v. State*, 230 Ga. App. 186, 495 S.E.2d 658 (1998); *Woods v. State*, 232 Ga. App. 367, 501 S.E.2d 832 (1998); *Smith v. State*, 291 Ga. App. 353, 662 S.E.2d 176 (2008).

Construed most favorably to the verdict, the evidence that defendant sold cocaine to undercover officers was sufficient to allow a rational jury to find defendant guilty of selling a controlled substance, selling a controlled substance within 1,000 feet of a public housing project, and resisting arrest. *Mikell v. State*, 231 Ga. App. 85, 498 S.E.2d 531 (1998).

Evidence supported the defendant’s conviction under O.C.G.A. § 16-13-32.5 after the chief construction inspector for the housing authority testified as to the correctness and accuracy of a map showing the public housing project near where the sale occurred, and which showed that a part of the project was within 20 feet of where the sale occurred. *McKay v. State*, 234 Ga. App. 556, 507 S.E.2d 484 (1998).

Evidence was sufficient to convict the defendant as there was testimony that the defendant’s actions took place within 1,000 feet of the city-owned housing project and evidence that the amount of

money found on the defendant's person, the specific denominations of currency, and the amount and specific packaging of the cocaine were all consistent with the intention to distribute cocaine. *Haywood v. State*, 248 Ga. App. 210, 546 S.E.2d 325 (2001).

Evidence was sufficient to support the defendant's conviction for distribution of a controlled substance within 1,000 feet of a public housing project as the evidence showed that the defendant was selling cocaine and that the sale took place less than 1,000 feet from a housing project. *Dixon v. State*, 252 Ga. App. 385, 556 S.E.2d 480 (2001).

When a police officer set up surveillance of an area located within 1,000 feet of an elementary school and 1,000 feet of a public housing project using a video camera, observed the defendant sell cocaine or marijuana in five transactions, and described the buyers to other police officers who apprehended the buyers and found the buyers in possession of the drugs which the defendant had sold the buyers, the videotape of the transactions and the testimony of the observing police officer along with the laboratory evidence regarding the drugs that were recovered from the various buyers was sufficient to sustain defendant's convictions under the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., on five counts of selling a controlled substance and additional counts of selling the drugs within 1,000 feet of a school and selling the drugs within 1,000 feet of public housing. *Robinson v. State*, 259 Ga. App. 595, 578 S.E.2d 235 (2003).

Accomplice's testimony combined with a videotape of the defendant in the front seat of a car while talking to a confidential police informant during a drug buy was sufficient corroboration to justify the defendant's convictions for selling cocaine within 1,000 feet of a housing project. *Etchison v. State*, 266 Ga. App. 528, 597 S.E.2d 583 (2004).

Because the evidence supporting the defendant's convictions revealed that the defendant was twice caught on tape selling crack cocaine to confidential informants, and a police officer testified that the location of one of the sales was within

200 to 300 feet of a public housing project the defendant's convictions for selling cocaine and of distributing cocaine within 1,000 feet of a housing project and 1,000 feet of a school were upheld; thus, the defendant was not entitled to a directed verdict of acquittal. *Banks v. State*, 270 Ga. App. 221, 606 S.E.2d 34 (2004).

Defendant was not entitled to a directed verdict of acquittal under O.C.G.A. § 17-9-1(a) on a charge of distributing cocaine within 1,000 feet of a public housing project in violation of O.C.G.A. § 16-13-32.5(b) because another participant in the drug transaction testified it occurred at the "Atlanta Street Apartments", and an officer familiar with the area testified that the "Atlanta Street Apartments" were owned by a housing authority and people of lower income lived there, the evidence was sufficient to show that the transaction occurred within 1,000 feet of a housing project. *Barnett v. State*, 276 Ga. App. 238, 623 S.E.2d 136 (2005).

Evidence that when a buyer went to the defendant's residence, the defendant had cocaine, which defendant then sold to the buyer, was sufficient to prove the elements of possession with intent to distribute for purposes of finding violations of O.C.G.A. §§ 16-13-32.4(a) and 16-13-32.5(a). *Smith v. State*, 278 Ga. App. 315, 628 S.E.2d 722 (2006).

As the evidence was sufficient to prove the defendant possessed cocaine with intent to distribute, the testimony of police officers that the defendant's actions took place within 1,000 feet of a housing project was sufficient to convict the defendant of violating O.C.G.A. § 16-13-32.5(b). *Hamilton v. State*, 293 Ga. App. 297, 666 S.E.2d 630 (2008).

Evidence was sufficient to show that defendant sold cocaine within 1,000 feet of a public housing project in violation of O.C.G.A. § 16-13-32.5(b) because the transaction occurred behind an apartment building, which was owned by a city housing authority to provide housing for low to moderate income families. *Henry v. State*, 301 Ga. App. 723, 688 S.E.2d 412 (2009).

Insufficient evidence to support conviction. — Conviction for selling cocaine within 1,000 feet of a public housing

project was reversed on appeal because insufficient evidence existed to prove that the purported housing project was under the jurisdiction of the local housing authority and housed low to moderate income families; the testimony of the local municipality's chief of police as to the measurement was insufficient without any evidence that the purported housing project was, in fact, under the jurisdiction of the local housing authority. *Collins v. State*, 278 Ga. App. 103, 628 S.E.2d 148 (2006).

While an investigator testified that the defendant sold cocaine to an officer less than 1,000 feet from a government housing development, the investigator did not testify that the development was the property of a municipal housing authority, or that it was occupied by low and moderate-income families. Therefore, the evidence was insufficient to show that the defendant possessed cocaine within 1,000 feet of a housing project in violation of O.C.G.A. § 16-13-32.5. *Mahone v. State*, 296 Ga. App. 373, 674 S.E.2d 411 (2009).

Evidence was insufficient to convict the defendant of drug trafficking within 1,000 feet of public housing in violation of O.C.G.A. § 16-13-32.5(b) because the state failed to establish that the defendant's residence, which was where the offense occurred, was within 1,000 feet of a publicly owned and operated housing project; the state's witnesses testified that the defendant's residence was located in a housing project, but there was no evidence establishing that the housing project was publicly owned or operated, and there was no testimony that the housing project was occupied by low and moderate-income families. *Williams v. State*, 303 Ga. App. 222, 692 S.E.2d 820 (2010).

Codefendant's convictions for possession of cocaine with intent to distribute, O.C.G.A. § 16-13-30(b), and possession with intent to distribute a controlled substance within 1,000 feet of a housing project, O.C.G.A. § 16-13-32.5(b), was un-

supportable as a matter of law, and the trial court erred by denying the codefendant's motion for a directed verdict of acquittal because the circumstantial evidence and the reasonable inferences derived therefrom were insufficient to connect the codefendant to the cocaine, which was found in an upstairs bedroom occupied by codefendants; no evidence was introduced to show that the codefendant resided in the apartment where the cocaine was found, which could authorize an inference that the codefendant possessed the property therein. *Jackson v. State*, 306 Ga. App. 33, 701 S.E.2d 481 (2010).

Instruction cured reading of wrong indictment. — Because the state presented sufficient evidence showing the defendant's involvement in the sale of cocaine and the sale of cocaine within 1,000 feet of public housing project as party to the crimes, and because the judge's instruction and explanation after reading the wrong indictment to the jury at trial cured any error, the defendant's convictions were upheld on appeal, and a mistrial based on the latter was properly denied; moreover, the defendant was properly denied a new trial. *Walker v. State*, 290 Ga. App. 749, 660 S.E.2d 844 (2008), cert. dismissed, 2008 Ga. LEXIS 776 (Ga. 2008).

Challenge to sufficiency of indictment. — Defendant waived appellate review of defendant's challenge to the indictment when the defendant claimed that the indictment charging the defendant with selling marijuana within 1,000 feet of a housing project failed to allege a violation of O.C.G.A. § 16-13-32.5, which makes it unlawful only to "manufacture, distribute, dispense, or possess with intent to distribute" marijuana at such location, but the defendant failed to object to the indictment in any manner before or during trial, and the defendant did not move to arrest the judgment after the defendant's conviction. *McKay v. State*, 234 Ga. App. 556, 507 S.E.2d 484 (1998).

RESEARCH REFERENCES

ALR. — Validity, construction, and application of state statutes enhancing penalty for sale or possession of controlled

substances within specified distance of playgrounds, 23 ALR6th 679.

16-13-32.6. Manufacturing, distributing, dispensing, or possessing with intent to distribute controlled substance or marijuana in, on, or within drug-free commercial zone.

(a) It shall be unlawful for any person to illegally manufacture, distribute, dispense, or possess with intent to distribute a controlled substance or marijuana in, on, or within any real property which has been designated under this Code section as a drug-free commercial zone.

(b)(1) Any person who violates or conspires to violate subsection (a) of this Code section shall be guilty of a felony and upon conviction shall receive the following punishment:

(A) Upon a first conviction, imprisonment for not more than 20 years or a fine of not more than \$20,000.00, or both; or

(B) Upon a second or subsequent conviction, imprisonment for not less than five years nor more than 40 years or a fine of not more than \$40,000.00, or both.

(2) A sentence imposed under this Code section shall be served consecutively to any other sentence imposed.

(3) Any person convicted of a violation of subsection (a) of this Code section may, as a condition of probation or parole, be required by the sentencing court or State Board of Pardons and Paroles to refrain for a period of not more than 24 months from entering or at any time being within the boundaries of the drug-free commercial zone wherein such person was arrested for a violation of this Code section. Any person arrested for violation of his or her terms of probation shall be governed by the provisions of Code Section 42-8-38 and any person arrested for a violation of his or her terms of parole shall be governed by the provisions of Article 2 of Chapter 9 of Title 42.

(c) A conviction arising under this Code section shall not merge with a conviction arising under any other provision of this article.

(d) Any municipality or county may designate one or more commercial areas where there is a high rate of drug related crime as drug-free commercial zones. A drug-free commercial zone may include only an area which the municipality or county has previously zoned commercial pursuant to its planning and zoning powers and any residential area contiguous to such commercially zoned area extending not more than one-half mile from the external boundary of any portion of the commercially zoned area. A municipality or county which designates one or more areas as drug-free commercial zones shall be required to make such designations by ordinance and shall be required to post prominent

and conspicuous signs on the boundaries of and throughout any such drug-free commercial zone. A municipality or county shall be required to file with the Department of Community Affairs a copy of each ordinance which shall have attached a clearly defined map describing each drug-free commercial zone and a report evidencing all drug related crimes in such drug-free commercial zone area during the 12 months preceding the enactment of such ordinance. A municipality or county shall also be required to file with the Department of Community Affairs, during the period that a drug-free commercial zone is in effect, annual reports evidencing all drug related crimes in such drug-free commercial zone. Such ordinances, maps, and drug crime reports shall be maintained in a permanent register by such department, and copies of such ordinances, maps, and drug crime reports of drug-free commercial zones shall be made available to the public at a reasonable cost. A drug-free commercial zone shall not be effective and valid for the purposes of this Code section until it has been adopted by the General Assembly by general law. After the General Assembly has adopted one or more drug-free commercial zones, the governing authority of each municipality or county which has such a zone or zones designated and adopted shall be required to have a description of each such zone published in the legal organ of the municipality or county at least once a week for three weeks. A drug-free commercial zone adopted by the General Assembly shall remain in effect for five years and shall expire five years from the effective date of such adoption by the General Assembly. An area which has been a drug-free commercial zone may be continued as or again designated as a drug-free commercial zone upon the enactment of an ordinance and adoption thereof by the General Assembly in accordance with the provisions of this subsection. No arrest for a violation of this Code section shall be permissible for a period of 30 days immediately following the effective date of the adoption of such drug-free commercial zone by the General Assembly.

(e) In a prosecution under this Code section, a true copy of a map produced or reproduced by any municipal or county agency or department for the purpose of depicting the location and boundaries of any drug-free commercial zone and filed and on record at the Department of Community Affairs shall, if certified as a true copy by the custodian of such records at such department, be admissible and shall constitute prima-facie evidence of the location and boundaries of such zone. A map approved under this Code section may be revised from time to time by the governing body of the municipality or county; provided, however, that a revised map shall not become effective and the revised area shall not be a drug-free commercial zone until the revised map has been filed with the Department of Community Affairs and adopted by the General Assembly by general law; provided, further, that the revision of a drug-free commercial zone shall not extend the expiration date of such

a drug-free commercial zone. The original copy of every map approved or revised under this subsection or a true copy of such original map shall be filed with the Department of Community Affairs and shall be maintained as an official record of the department. This subsection shall not preclude the prosecution from introducing or relying upon any other evidence or testimony to establish any element of this offense.

(f) The General Assembly hereby adopts and incorporates into this Code section all drug-free commercial zones which have been adopted by municipal or county ordinance and entered in the register of the Department of Community Affairs as provided for in subsection (d) of this Code section on or before March 28, 2011. (Code 1981, § 16-13-32.6, enacted by Ga. L. 1996, p. 1049, § 1; Ga. L. 1999, p. 556, § 1; Ga. L. 2004, p. 1070, § 1A; Ga. L. 2011, p. 308, § 1/HB 457.)

The 2011 amendment, effective May 11, 2011, substituted "March 28, 2011" for "March 10, 2004" at the end of subsection (f).

Law reviews. — For review of 1996 controlled substances legislation, see 13 Georgia St. U.L. Rev. 98 (1996).

16-13-33. Attempt or conspiracy to commit offense under this article.

Any person who attempts or conspires to commit any offense defined in this article shall be, upon conviction thereof, punished by imprisonment not exceeding the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy. (Code 1933, § 79A-812, enacted by Ga. L. 1974, p. 221, § 1.)

Law reviews. — For article surveying developments in Georgia criminal law

from mid-1980 through mid-1981, see 33 Mercer L. Rev. 95 (1981).

JUDICIAL DECISIONS

Legislative intent. — Most reasonable interpretation of the legislative intent in enacting O.C.G.A. § 16-13-33 was to supplant the general punishment provision for criminal attempt found in O.C.G.A. § 16-4-6. *Davis v. State*, 164 Ga. App. 633, 298 S.E.2d 615 (1982).

O.C.G.A. §§ 16-4-6 and 16-13-33 are mutually exclusive. — O.C.G.A. § 16-13-33 does not affect operation of O.C.G.A. § 16-4-3, but rather it renders O.C.G.A. § 16-4-6 inapplicable in prosecutions under the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq. *Davis v. State*, 164 Ga. App. 633, 298 S.E.2d 615 (1982).

O.C.G.A. §§ 16-4-6 and 16-13-33 are

mutually exclusive and there is no uncertainty as to which applies, — O.C.G.A. § 16-13-33 renders O.C.G.A. § 16-4-6 inapplicable in prosecutions under the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., because if a crime is penalized by a special law, the general provisions of the penal code are not applicable; accordingly, there is no merit to the assertion that O.C.G.A. § 16-13-33 contravenes the rule of lenity, and the trial court did not err in imposing a sentence for marijuana convictions under that provision rather than O.C.G.A. § 16-4-6. *Woods v. State*, 279 Ga. 28, 608 S.E.2d 631 (2005).

Phrase, "Any person who ... con-

spires,” means any person who commits a conspiracy as defined by O.C.G.A. § 16-4-8. *Hammock v. Zant*, 244 Ga. 863, 262 S.E.2d 82 (1979).

Overt act required. — Former Code 1933, § 79A-812 required with certainty an overt act for successful prosecution. *Hammock v. Zant*, 244 Ga. 863, 262 S.E.2d 82 (1979) (see O.C.G.A. § 16-13-33).

To be guilty of conspiracy under O.C.G.A. § 16-13-33 one or more of the conspirators must commit an overt act as required by O.C.G.A. § 16-4-8. *Price v. State*, 247 Ga. 58, 273 S.E.2d 854 (1981).

Only one conspiracy can result from single agreement. — Whether object of single agreement is to commit one or many crimes, it is in either case the agreement that constitutes the conspiracy, and if there is only one agreement there can be only one conspiracy. *Price v. State*, 247 Ga. 58, 273 S.E.2d 854 (1981).

Separate convictions under separate conspiracy statutes may be authorized. — When conspiracy contemplates commission of more than one substantive offense, and there are separate conspiracy statutes separately punishing a conspiracy to commit each offense, a separate conviction under each conspiracy statute may be authorized. *Price v. State*, 247 Ga. 58, 273 S.E.2d 854 (1981).

There may be multiple convictions for multiple substantive offenses committed pursuant to single conspiracy. *Price v. State*, 247 Ga. 58, 273 S.E.2d 854 (1981).

Lesser included offenses. — Conspiracy to possess marijuana with intent to distribute is not a lesser included offense of possession. *Rowe v. State*, 181 Ga. App. 492, 352 S.E.2d 813 (1987).

When the defendant was convicted of trafficking in marijuana, a conviction for conspiracy to traffic in marijuana cannot also stand and the jury should be instructed that a verdict of one or the other is authorized but not both. *Hardin v. State*, 172 Ga. App. 232, 322 S.E.2d 540 (1984).

Charging the defendant with conspiracy to sell and distribute cocaine after defendant pled guilty to a substantive crime, possession of cocaine, did not con-

stitute double jeopardy because the second prosecution required proof of facts not required on the prior prosecution. *Rogers v. State*, 201 Ga. App. 426, 411 S.E.2d 289 (1991).

An indictment that accused a defendant and a codefendant of acting together as parties to the crime to commit the offense of possession of cocaine with intent to distribute accused the defendant in a manner that included a conspiracy offense. As the evidence was sufficient to allow the jury to conclude that the defendant conspired with the codefendant to possess the cocaine without actually reaching the point of possession, the defendant's sentence for a conviction of the lesser-included offense of conspiracy to possess cocaine with intent to distribute was not void, even though that offense was not charged in the indictment. *King v. State*, 295 Ga. App. 865, 673 S.E.2d 329 (2009).

Merger with substantive offense. — Offenses of conspiracy to traffic in marijuana and trafficking itself did not merge when conspirators first possessed the marijuana, since the “trafficking” charge involved sale of the marijuana, an act not yet completed. *Meyers v. State*, 174 Ga. App. 161, 329 S.E.2d 293 (1985).

Offense of selling marijuana was not complete upon defendants' leading of undercover agents to the site of the marijuana since an agreed-upon weighing, loading, and delivering had not yet occurred; thus, the substantive trafficking offense did not merge with or extinguish the conspiracy-to-traffic offense. *Meyers v. State*, 174 Ga. App. 161, 329 S.E.2d 293 (1985).

Charges of conspiracy to import marijuana and trafficking in marijuana could be joined for trial where the charges arose from the same conduct. *Bridges v. State*, 195 Ga. App. 851, 395 S.E.2d 30 (1990).

Admission of character evidence held harmless error. — Evidence of conversation showing that defendant was willing to be a “bigtime” cocaine dealer was erroneously admitted, but where the evidence of defendant's guilt was ample and it was highly probable that placing defendant's character in issue did not contribute to the jury's verdict, the error was

not harmful. *Hargrove v. State*, 188 Ga. App. 336, 373 S.E.2d 44 (1988).

Sentence for conspiracy to traffic in marijuana. — Sentencing provisions in O.C.G.A. § 16-13-33, not the general provisions in O.C.G.A. § 16-4-8, are applicable to the offense of conspiracy to traffic in marijuana. *Raftis v. State*, 175 Ga. App. 893, 334 S.E.2d 857 (1985).

Maximum punishment provisions of this article apply to indictment charging conspiracy. — If defendants are indicted under general conspiracy statute, maximum punishment provisions of it apply, but if indictment charges, "Conspiracy to Possess and Sell Marijuana," a violation of provisions of the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., is properly charged and maximum punishment provisions of it apply. *Jones v. State*, 135 Ga. App. 893, 219 S.E.2d 585 (1975).

Because conspiracy to manufacture methamphetamine was a crime penalized by a special law, the general provisions of the penal code did not apply; thus, under both O.C.G.A. §§ 16-13-30 and 16-13-33, which were mutually exclusive, defendant was properly sentenced to 30 years, which was the maximum sentence allowed. *McWhorter v. State*, 275 Ga. App. 624, 621 S.E.2d 571 (2005).

Maximum sentence appropriate. — Defendant's conviction did not have to be reversed on the ground that the indictment alleged one manner of the offense and the evidence showed another manner of the offense as the statute for trafficking in cocaine allowed possession of either pure cocaine or a cocaine mixture, and the conspiracy offense on which defendant was convicted required only that defendant conspire with others to knowingly possess cocaine and that one of the conspirators overtly acted to do so; since that evidence was present, defendant's conviction was not invalid and defendant was eligible for the maximum term for the offense which was the object of the conspiracy, trafficking in cocaine. *Allison v. State*, 259 Ga. App. 775, 577 S.E.2d 845 (2003).

Mandatory term not required. — Although O.C.G.A. § 16-13-33 provides for the possible imposition of the same

maximum term of imprisonment as would be applicable to the substantive crime, that section does not require the court to impose a mandatory term of imprisonment, or deny the court the discretion it would otherwise have under O.C.G.A. § 16-13-31 in determining whether the sentence it imposes is to be served entirely in prison. *Raftis v. State*, 175 Ga. App. 893, 334 S.E.2d 857 (1985).

Fine unauthorized when sentences not probated. — Fines imposed upon convictions of conspiracy to traffic in cocaine and marijuana were unauthorized and void since no part of the sentences was probated. *Gonzalez v. State*, 201 Ga. App. 437, 411 S.E.2d 345 (1991).

O.C.G.A. § 16-13-33 contains no provision for imposition of a fine. *Gonzalez v. State*, 201 Ga. App. 437, 411 S.E.2d 345 (1991).

Fine as condition of probation authorized. — Even though conviction of conspiracy under O.C.G.A. § 16-13-33 did not authorize imposition of a fine, a fine up to \$10,000 was authorized as a condition of probation. *Washington v. State*, 183 Ga. App. 422, 359 S.E.2d 198 (1987).

Imposition of \$100,000.00 fine as condition of probation was invalid, illegal and void for the reason that, since the offense of attempted trafficking in cocaine is punishable by imprisonment but contains no provision for a fine, the maximum fine which could be imposed as a condition of probation was \$10,000.00. *Holbert v. State*, 177 Ga. App. 461, 340 S.E.2d 25 (1986).

Imposition of fine precluded. — When the clear language of O.C.G.A. § 16-13-33 precludes the imposition of a fine in conjunction with a prison sentence for conspiracy to violate the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., the preclusion applies equally to attempt and conspiracy. *Watson v. State*, 276 Ga. 212, 576 S.E.2d 897 (2003).

Under O.C.G.A. § 16-13-33, a conviction for criminal attempt to violate the Georgia Controlled Substance Act, O.C.G.A. § 16-13-20 et seq., does not authorize the imposition of a fine; therefore, *Watson v. State*, 256 Ga. App. 789 (2002) is reversed to the extent that it holds to the

contrary. *Watson v. State*, 276 Ga. 212, 576 S.E.2d 897 (2003).

Improper conviction of multiple conspiracy counts is harmless where sentence is within legal limits for single conspiracy. *Price v. State*, 247 Ga. 58, 273 S.E.2d 854 (1981).

Circumstantial evidence sufficient to convict. — Circumstantial evidence linking defendant to codefendant drug pilot, to a warehouse containing weapons, records of the criminal enterprise and aircraft equipment, and to an admitted smuggler of Colombian cocaine, was sufficient for a conviction under O.C.G.A. § 16-13-33. *Parrott v. State*, 206 Ga. App. 829, 427 S.E.2d 276 (1993).

Consent order modifying original sentence was void. — Trial court properly vacated a consent order modifying the defendant's original sentence as such was based upon a mistake of law induced by the defendant personally, and hence, void; moreover, because the defendant was sen-

tenced as a recidivist, the trial court was required to impose a sentence pursuant to O.C.G.A. § 17-10-7(a). *Sosebee v. State*, 282 Ga. App. 905, 640 S.E.2d 379 (2006).

Cited in *Barner v. State*, 139 Ga. App. 50, 227 S.E.2d 874 (1976); *Hammock v. State*, 146 Ga. App. 339, 246 S.E.2d 392 (1978); *Hammock v. Zant*, 243 Ga. 259, 253 S.E.2d 727 (1979); *Hughes v. State*, 150 Ga. App. 90, 256 S.E.2d 634 (1979); *Owens v. State*, 153 Ga. App. 525, 265 S.E.2d 856 (1980); *Little v. State*, 157 Ga. App. 462, 278 S.E.2d 17 (1981); *Tookes v. State*, 159 Ga. App. 423, 283 S.E.2d 642 (1981); *Lewis v. State*, 161 Ga. App. 348, 288 S.E.2d 124 (1982); *State v. Lewis*, 249 Ga. 565, 292 S.E.2d 667 (1982); *Dyer v. State*, 162 Ga. App. 773, 293 S.E.2d 42 (1982); *Barnes v. State*, 255 Ga. 396, 339 S.E.2d 229 (1986); *Causey v. State*, 192 Ga. App. 294, 384 S.E.2d 674 (1989); *Lovain v. State*, 253 Ga. App. 271, 558 S.E.2d 812 (2002); *Capestany v. State*, 289 Ga. App. 47, 656 S.E.2d 196 (2007).

RESEARCH REFERENCES

ALR. — When does statute of limitations begin to run against civil action or

criminal prosecution for conspiracy, 62 ALR2d 1369.

16-13-34. Promulgation of rules relating to registration and control of controlled substances; registration fees.

The State Board of Pharmacy may promulgate rules and charge reasonable fees relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances within this state. (Code 1933, § 79A-813, enacted by Ga. L. 1974, p. 221, § 1; Ga. L. 1982, p. 3, § 16.)

Administrative rules and regulations. — Licensure as a pharmacist, Official Compilation of the Rules and Regulations of the State of Georgia, Georgia State Board of Pharmacy, Ch. 480-2. Retail pharmacy regulations, Official Compilation of the Rules and Regulations of the State of Georgia, Georgia State Board of Pharmacy, Ch. 480-10. Specialty pharmacy practice, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of State Board of Pharmacy, Chapter 480-12. Exemptions and

requirements of Georgia Controlled Substances Act, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of State Board of Pharmacy, Chapters 480-18 through 480-22. Fee, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of State Board of Pharmacy, Chapter 480-26. Practitioner dispensing of drugs, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of State Board of Pharmacy, Chapter 480-28.

JUDICIAL DECISIONS

Cited in United States v. Gaultney, 606 F.2d 540 (5th Cir. 1979).

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Drugs and Controlled Substances, §§ 21 et seq., 58, 62.

C.J.S. — 28 C.J.S., Drugs and Narcotics, §§ 14 et seq., 69 et seq., 213.

U.L.A. — Uniform Controlled Substances Act (U.L.A.) § 301.

16-13-35. General registration requirements.

(a) Every person who manufactures, distributes, or dispenses any controlled substances within this state or who proposes to engage in the manufacture, distribution, or dispensing of any controlled substance within this state must obtain annually a registration issued by the State Board of Pharmacy in accordance with its rules.

(b) Persons registered by the State Board of Pharmacy under this article to manufacture, distribute, dispense, or conduct research with controlled substances may possess, manufacture, distribute, dispense, or conduct research with those substances to the extent authorized by their registration and in conformity with this article.

(c) The following persons need not register and may lawfully possess controlled substances under this article:

(1) An agent or employee of any registered manufacturer, distributor, or dispenser of any controlled substance if he is acting in the usual course of his business or employment;

(2) A common or contract carrier or warehouseman, or any employee thereof, whose possession of any controlled substance is in the usual course of his business or employment;

(3) An ultimate user or a person in possession of any controlled substance pursuant to a lawful order of a practitioner or in lawful possession of a Schedule V substance; and

(4) Officers and employees of this state, or of a political subdivision of this state, or of the United States while acting in the course of their official duties.

(d) The State Board of Pharmacy may waive by rule the requirements for registration of certain manufacturers, distributors, or dispensers if it finds it consistent with the public health and safety.

(e) A separate registration is required at each principal place of business or professional practice where the applicant manufactures, distributes, or dispenses controlled substances.

(f) The State Board of Pharmacy, the director of the Georgia Drugs and Narcotics Agency, or other drug agents designated by the State Board of Pharmacy for this purpose may inspect the establishment of a registrant or applicant for registration in accordance with the State Board of Pharmacy rules and the provisions of this article.

(g) The following persons are registered under this article and are exempt from the registration fee and registration application requirements of this article:

(1) Persons licensed by the State Board of Pharmacy as a pharmacist or a pharmacy under Chapter 4 of Title 26;

(2) Persons licensed as a physician, dentist, or veterinarian under the laws of the state to use, mix, prepare, dispense, prescribe, and administer drugs in connection with medical treatment to the extent provided by the laws of this state; and

(3) An employee, agent, or representative of any person described in paragraph (1) or (2) of this subsection acting in the usual course of his employment or occupation and not on his own account, provided that suspension or revocation of licensure as set forth in paragraphs (1) and (2) of this subsection shall nullify the exemption as set forth in this subsection. (Code 1933, § 79A-814, enacted by Ga. L. 1974, p. 221, § 1; Ga. L. 1982, p. 3, § 16.)

Administrative rules and regulations. — Registration requirements under Georgia Controlled Substances Act,

Official Compilation of the Rules and Regulations of the State of Georgia, Georgia Board of Pharmacy, Ch. 480-20.

JUDICIAL DECISIONS

Constitutionality. — As O.C.G.A. § 16-13-35 specifies that certain institutions and persons legally may possess controlled substances, O.C.G.A. § 16-13-20 et seq., is not constitutionally illogical or overbroad. *Windfaire, Inc. v. Busbee*, 523 F. Supp. 868 (N.D. Ga. 1981).

One lawfully possessing a controlled substance may lawfully possess it out of its original container. *Jones v. State*, 145 Ga. App. 224, 243 S.E.2d 645 (1978).

Physicians are authorized to possess controlled substances to the extent they do so as physicians, i.e., to the extent such possession is for some use connected with their medical practice. *Felker v. State*, 172 Ga. App. 492, 323 S.E.2d 817 (1984), cert. denied, 471 U.S. 1102, 105 S. Ct. 2328, 85 L. Ed. 2d 846 (1985).

Qualification of expert to perform drug analysis. — When at pretrial hearing to determine whether expert designated by appellant was qualified to perform analysis of alleged drugs revealed that the expert was neither licensed, registered, nor otherwise exempted pursuant to O.C.G.A. Ch. 13, T. 16, and after the trial court gave defense counsel approximately 24 hours to determine whether counsel wished to qualify this expert for any procedures which did not require reference samples of the controlled substance, or to qualify another expert, and counsel did neither, it was not an abuse of discretion to deny a motion for independent laboratory analysis. *McAdoo v. State*, 164 Ga. App. 23, 295 S.E.2d 114 (1982).

Cited in *United States v. Gaultney*, 606 F.2d 540 (5th Cir. 1979); *Curtis v. State*, 172 Ga. App. 473, 323 S.E.2d 684 (1984).

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Drugs and Controlled Substances, § 62 et seq.

C.J.S. — 28 C.J.S., Drugs and Narcotics, §§ 69, 70, 210 et seq.

U.L.A. — Uniform Controlled Substances Act (U.L.A.) § 302.

ALR. — State law criminal liability of licensed physician for prescribing or dispensing drug or similar controlled substance, 13 ALR5th 1.

16-13-36. Factors considered in determining whether to register manufacturer or distributor.

(a) The State Board of Pharmacy shall register an applicant to manufacture or distribute controlled substances included in Code Sections 16-13-25 through 16-13-29 unless it determines that the issuance of that registration would be inconsistent with the public interest. In determining the public interest, the State Board of Pharmacy shall consider the following factors:

(1) Maintenance of effective controls against diversion of controlled substances into other than legitimate medical, scientific, or industrial channels;

(2) Compliance with applicable state and local law;

(3) Any convictions of the applicant under any federal or state laws relating to any controlled substance;

(4) Past experience in the manufacture or distribution of controlled substances and the existence in the applicant's establishment of effective controls against illegal diversion of controlled substances;

(5) Furnishing by the applicant of false or fraudulent material in any application filed under this article;

(6) Suspension or revocation of the applicant's federal registration to manufacture, distribute, or dispense controlled substances as authorized by federal law;

(7) Suspension or revocation of the applicant's registration or license to manufacture, distribute, or dispense controlled substances, drugs, or narcotics in this state or any other state of the United States; and

(8) Any other factors relevant to and consistent with the public health and safety.

(b) Registration under subsection (a) of this Code section does not entitle a registrant to manufacture and distribute controlled substances in Schedule I or II other than those specified in the registration.

(c) Practitioners must be registered under state law to dispense any controlled substances or to conduct research with controlled substances

in Schedules II through V if they are authorized to dispense or conduct research under the law of this state. The State Board of Pharmacy need not require separate registration under this Code section for practitioners engaging in research with nonnarcotic controlled substances in Schedules II through V where the registrant is already registered under this article in another capacity. Practitioners registered under federal law to conduct research with Schedule I substances may conduct research with Schedule I substances within this state upon furnishing the State Board of Pharmacy satisfactory evidence of that federal registration. Any practitioner conducting research with Schedule I controlled substances must obtain a separate registration with the State Board of Pharmacy.

(d) Compliance by manufacturers and distributors with the provisions of federal law respecting registration (excluding fees) entitles them to be registered under this article. (Code 1933, § 79A-815, enacted by Ga. L. 1967, p. 296, § 1; Ga. L. 1974, p. 221, § 1; Ga. L. 1977, p. 625, § 8; Ga. L. 1982, p. 3, § 16.)

JUDICIAL DECISIONS

Cited in *United States v. Gaultney*, 606 F.2d 540 (5th Cir. 1979).

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Drugs and Controlled Substances, § 70 et seq.

C.J.S. — 28 C.J.S., Drugs and Narcotics, §§ 69, 70, 79 et seq., 210 et seq.

U.L.A. — Uniform Controlled Substances Act (U.L.A.) § 303.

16-13-37. Grounds for suspending or revoking registration; disposition of controlled substances; notification to bureau.

(a) A registration under Code Section 16-13-36 to manufacture, distribute, or dispense a controlled substance may be suspended or revoked by the State Board of Pharmacy upon a finding that the registrant:

- (1) Has furnished false or fraudulent material information in any application filed under this article;
- (2) Has been convicted of a felony under any state or federal law relating to any controlled substance;
- (3) Has had his federal registration to manufacture, distribute, or dispense controlled substances suspended or revoked;
- (4) Has violated any provision of this article or the rules and regulations promulgated under this article; or

(5) Has failed to maintain sufficient controls against diversion of controlled substances into other than legitimate medical, scientific, or industrial channels.

(b) The State Board of Pharmacy may limit revocation or suspension of a registration to the particular controlled substance with respect to which grounds for revocation or suspension exist.

(c) If the State Board of Pharmacy suspends or revokes a registration, all controlled substances owned or possessed by the registrant at the time of suspension or the effective date of the revocation order shall be placed under seal. No disposition may be made of substances under seal until the time for taking an appeal has elapsed or until all appeals have been concluded unless a court, upon application therefor, orders the sale of perishable substances and the deposit of the proceeds of the sale with the court. Upon a revocation order becoming final, all controlled substances shall be forfeited to the state.

(d) The State Board of Pharmacy shall promptly notify the bureau of all orders suspending or revoking registration and all forfeitures of controlled substances. (Code 1933, § 79A-816, enacted by Ga. L. 1967, p. 296, § 1; Ga. L. 1974, p. 221, § 1; Ga. L. 1982, p. 3, § 16; Ga. L. 1992, p. 6, § 16.)

JUDICIAL DECISIONS

Cited in *United States v. Gaultney*, 606 F.2d 540 (5th Cir. 1979).

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, *Drugs and Controlled Substances*, §§ 72, 73.

U.L.A. — *Uniform Controlled Substances Act* (U.L.A.) § 304.

C.J.S. — 28 C.J.S., *Drugs and Narcotics*, §§ 69, 70, 87 et seq., 227 et seq.

16-13-38. Procedure for denying, suspending, revoking, or limiting registration; automatic suspension.

(a) Before denying, suspending, revoking, or limiting registration, or refusing a renewal of registration, the State Board of Pharmacy shall serve upon the applicant or registrant an order to show cause why registration should not be denied, revoked, limited, or suspended, or why the renewal should not be refused. The order to show cause shall contain a statement of the basis therefor and shall call upon the applicant or registrant to appear before the State Board of Pharmacy at a time and place not less than 30 days after the date of service of the order; but in the case of a denial of renewal of registration the show cause order shall be served not later than 30 days before the expiration

of the registration. These proceedings shall be conducted in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," without regard to any criminal prosecution or other proceeding. Proceedings to refuse renewal or registration shall not abate the existing registration, which shall remain in effect pending the outcome of the administrative hearing.

(b) The State Board of Pharmacy shall suspend, without an order to show cause, any registration simultaneously with the institution of proceedings under Code Section 16-13-37 or where renewal of registration is refused if it finds that there is an imminent danger to the public health or safety which warrants this action. The suspension shall continue in effect until the conclusion of the proceedings, including judicial review thereof, unless sooner withdrawn by the State Board of Pharmacy or dissolved by a court of competent jurisdiction. (Code 1933, § 79A-817, enacted by Ga. L. 1974, p. 221, § 1; Ga. L. 1982, p. 3, § 16.)

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Drugs and Controlled Substances, §§ 70, 74.

C.J.S. — 28 C.J.S., Drugs and Narcotics, §§ 69, 70, 87 et seq.

U.L.A. — Uniform Controlled Substances Act (U.L.A.) § 305.

16-13-39. Manufacturers, distributors, and dispensers to maintain records of controlled substances.

Persons registered to manufacture, distribute, or dispense controlled substances under this article shall keep a complete and accurate record of all controlled substances on hand, received, manufactured, sold, dispensed, or otherwise disposed of and shall maintain such records and inventories in conformance with the record-keeping and inventory requirements of federal law and with any rules issued by the State Board of Pharmacy. (Code 1933, § 79A-810, enacted by Ga. L. 1967, p. 296, § 1; Code 1933, § 79A-818, enacted by Ga. L. 1974, p. 221, § 1; Ga. L. 1982, p. 3, § 16.)

Cross references. — Section not superseded by excise tax on marijuana and controlled substances, § 48-15-11.

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Drugs and Controlled Substances, §§ 68 et seq., 78, 107.

C.J.S. — 28 C.J.S., Drugs and Narcotics, §§ 69, 70, 225, 226.

U.L.A. — Uniform Controlled Substances Act (U.L.A.) § 306.

16-13-40. Distribution of Schedule I and II substances.

Controlled substances in Schedules I and II shall be distributed by a registrant to another registrant only pursuant to an order form. Compliance with federal law respecting order forms shall be deemed compliance with this Code section. (Code 1933, § 79A-819, enacted by Ga. L. 1974, p. 221, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Drugs and Controlled Substances, §§ 70, 78, 162. **ics,** §§ 219, 225, 226, 312. 28A C.J.S., Drugs and Narcotics, § 502.

U.L.A. — Uniform Controlled Substances Act (U.L.A.) § 307.

16-13-41. Prescriptions.

(a) Except when dispensed directly by a registered practitioner, other than a pharmacy or pharmacist, to an ultimate user, no controlled substance in Schedule II may be dispensed without the written prescription of a registered practitioner.

(b) When a practitioner writes a prescription drug order to cause the dispensing of a Schedule II substance, he or she shall include the name and address of the person for whom it is prescribed, the kind and quantity of such Schedule II controlled substance, the directions for taking, the signature, and the name, address, telephone number, and DEA registration number of the prescribing practitioner. Such prescription shall be signed and dated by the practitioner on the date when issued, and the nature of such signature shall be defined in regulations promulgated by the State Board of Pharmacy. Prescription drug orders for Schedule II controlled substances may be transmitted via facsimile machine or other electronic means only in accordance with regulations promulgated by the State Board of Pharmacy in accordance with Code Section 26-4-80 or 26-4-80.1, or in accordance with DEA regulations at 21 C.F.R. 1306.

(c) In emergency situations, as defined by rule of the State Board of Pharmacy, Schedule II drugs may be dispensed upon oral prescription of a registered practitioner, reduced promptly to writing and filed by the pharmacy. Prescriptions shall be retained in conformity with the requirements of Code Section 16-13-39. No prescription for a Schedule II substance may be refilled.

(d)(1) Except when dispensed directly by a practitioner, other than a pharmacy or pharmacist, to an ultimate user, a controlled substance included in Schedule III, IV, or V, which is a prescription drug as determined under any law of this state or the Federal Food, Drug and

Cosmetic Act, 21 U.S.C. Section 301, 52 Stat. 1040 (1938), shall not be dispensed without a written or oral prescription of a registered practitioner. The prescription shall not be filled or refilled more than six months after the date on which such prescription was issued or be refilled more than five times.

(2) When a practitioner writes a prescription drug order to cause the dispensing of a Schedule III, IV, or V controlled substance, he or she shall include the name and address of the person for whom it is prescribed, the kind and quantity of such controlled substance, the directions for taking, the signature, and the name, address, telephone number, and DEA registration number of the practitioner. Such prescription shall be signed and dated by the practitioner on the date when issued or may be issued orally, and the nature of the signature of the prescriber shall meet the guidelines set forth in Chapter 4 of Title 26, the regulations promulgated by the State Board of Pharmacy, or both such guidelines and regulations.

(e) A controlled substance included in Schedule V shall not be distributed or dispensed other than for a legitimate medical purpose.

(f) No person shall prescribe or order the dispensing of a controlled substance, except a registered practitioner who is:

(1) Licensed or otherwise authorized by this state to prescribe controlled substances;

(2) Acting in the usual course of his professional practice; and

(3) Prescribing or ordering such controlled substances for a legitimate medical purpose.

(g) No person shall fill or dispense a prescription for a controlled substance except a person who is licensed by this state as a pharmacist or a pharmacy intern acting under the immediate and direct personal supervision of a licensed pharmacist in a pharmacy licensed by the State Board of Pharmacy, provided that this subsection shall not prohibit a registered physician, dentist, veterinarian, or podiatrist authorized by this state to dispense controlled substances as provided in this article if such registered person complies with all record-keeping, labeling, packaging, and storage requirements regarding such controlled substances and imposed upon pharmacists and pharmacies in this chapter and in Chapter 4 of Title 26 and complies with the requirements of Code Section 26-4-130.

(h) It shall be unlawful for any practitioner to issue any prescription document signed in blank. The issuance of such document signed in blank shall be prima-facie evidence of a conspiracy to violate this article. The possession of a prescription document signed in blank by a person other than the person whose signature appears thereon shall be

prima-facie evidence of a conspiracy between the possessor and the signer to violate the provisions of this article.

(i)(1) Pharmacists may dispense prescriptions from a remote location for the benefit of an institution that uses a remote automated medication system in accordance with the requirements set forth in the rules and regulations adopted by the State Board of Pharmacy pursuant to paragraph (12.1) of subsection (a) of Code Section 26-4-28.

(2) As used in this subsection, the term “institution” means a skilled nursing facility or a hospice licensed as such under Chapter 7 of Title 31. (Code 1933, § 79A-820, enacted by Ga. L. 1974, p. 221, § 1; Ga. L. 1979, p. 859, § 10; Ga. L. 1982, p. 3, § 16; Ga. L. 1983, p. 349, § 2; Ga. L. 1985, p. 149, § 16; Ga. L. 1985, p. 1219, § 5; Ga. L. 1986, p. 1031, § 1; Ga. L. 1999, p. 81, § 16; Ga. L. 2003, p. 349, § 7; Ga. L. 2007, p. 47, § 16/SB 103; Ga. L. 2011, p. 308, § 2/HB 457.)

The 2011 amendment, effective May 11, 2011, added subsection (i).

Cross references. — Georgia Pharmacy Practice Act, § 26-4-1 et seq.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1988, “Federal” was capitalized preceding “Food, Drug and Cosmetic Act” in the first sentence of paragraph (d)(1).

Administrative rules and regulations. — Opioid treatment program clinical pharmacies, Official Compilation of the Rules and Regulations of the State of Georgia, Georgia State Board of Pharmacy, Ch. 480-18.

JUDICIAL DECISIONS

O.C.G.A. § 16-13-41(h) was not unconstitutionally vague as applied to a defendant, a physician, who was charged with violating O.C.G.A. § 16-13-42(a)(1) by improperly providing 33 signed prescription forms in blank to the defendant’s nurse practitioner in violation of § 16-13-41(h) as that provision broadly included possession of a document by any person other than the one whose signature appeared thereon; thus, a physician’s staff member could not be excluded. *Raber v. State*, 285 Ga. 251, 674 S.E.2d 884 (2009).

Pharmacy license as defense to drug possession charge. — Whether an individual has a license or is otherwise lawfully permitted to have in one’s possession narcotic drugs under O.C.G.A. Ch. 13, T. 16 is a matter of defense and not an element of the offense. *Woods v. State*, 233

Ga. 347, 211 S.E.2d 300 (1974), appeal dismissed, 422 U.S. 1002, 95 S. Ct. 2623, 45 L. Ed. 2d 667 (1975).

State must prove prescription was not for legitimate medical purpose. *Strong v. State*, 246 Ga. 612, 272 S.E.2d 281 (1980).

Indictment did not violate equal protection. — When the defendant was indicted for unlawfully prescribing a controlled substance for other than a legitimate medical purpose by an officer of the Georgia Bureau of Investigation rather than officers of the State Board of Pharmacy or Drug and Narcotics Agency, there was no denial of equal protection of the law, there being no different treatment for some persons in defendant’s circumstances. *Strong v. State*, 246 Ga. 612, 272 S.E.2d 281 (1980).

OPINIONS OF THE ATTORNEY GENERAL

Nurse may relay practitioner's order by telephone. — When the registered practitioner has actually ordered a controlled substance with the nurse merely acting as the relaying link in the communication process through use of the telephone, former Code 1933, §§ 79A-102 and 79A-820 did not specifically proscribe this activity. 1979 Op. Att'y Gen. No. 79-32. (see O.C.G.A. § 16-13-41(f)).

Nurses may not write or telephone

in prescriptions by referring to written protocol. 1988 Op. Att'y Gen. No. 88-9.

Unlicensed personnel in health care institutions. — Under former Code 1933, §§ 84-906(b), 84-1012 and T. 79A, the administration of medications by unlicensed personnel in health care institutions would not be in violation of state law. 1975 Op. Att'y Gen. No. 75-44. (see O.C.G.A. § 43-34-26(b), and Ch. 13, T. 16).

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Drugs and Controlled Substances, §§ 19 et seq., 27, 47, 79 et seq.

C.J.S. — 28 C.J.S., Drugs and Narcotics, §§ 65 et seq., 99 et seq., 210 et seq.

U.L.A. — Uniform Controlled Substances Act (U.L.A.) § 308.

ALR. — Charge of illegal sale of narcotics or intoxicating liquor predicated upon defendant's issuance of prescription therefor otherwise than in the course of his professional practice, 133 ALR 1140.

Construction of provision of Uniform

Narcotic Drug Act requiring a physician's prescription as a prerequisite to a pharmacist's sale of narcotics, 10 ALR3d 560.

Common-law right of action for damage sustained by plaintiff in consequence of sale or gift of intoxicating liquor or habit-forming drug to another, 97 ALR3d 528; 62 ALR4th 16.

Social host's liability for injuries incurred by third parties as a result of intoxicated guest's negligence, 62 ALR4th 16.

16-13-42. Unauthorized distribution and dispensation; refusal or failure to keep records; refusal to permit inspection; unlawfully maintaining structure or place; penalty.

(a) It is unlawful for any person:

(1) Who is subject to the requirements of Code Section 16-13-35 to distribute or dispense a controlled substance in violation of Code Section 16-13-41;

(2) Who is a registrant to manufacture a controlled substance not authorized by his registration or to distribute or dispense a controlled substance not authorized by his registration to another registrant or other authorized person;

(3) To refuse or fail to make, keep, or furnish any record, notification, order form, statement, invoice, or information required under this article;

(4) To refuse an entry into any premises for any inspection authorized by this article; or

(5) Knowingly to keep or maintain any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place which is resorted to by persons using controlled substances in violation of this article for the purpose of using these substances, or which is used for keeping or selling them in violation of this article.

(b) Any person who violates this Code section is guilty of a felony and, upon conviction thereof, may be imprisoned for not more than five years, fined not more than \$25,000.00, or both. (Code 1933, § 79A-821, enacted by Ga. L. 1974, p. 221, § 1; Ga. L. 1978, p. 1668, § 10.)

JUDICIAL DECISIONS

O.C.G.A. § 16-13-41(h) was not unconstitutionally vague as applied to a defendant, a physician, who was charged with violating O.C.G.A. § 16-13-42(a)(1) by improperly providing 33 signed prescription forms in blank to the defendant's nurse practitioner in violation of § 16-13-41(h) as that provision broadly included possession of a document by any person other than the one whose signature appeared thereon; thus, a physician's staff member could not be excluded. *Raber v. State*, 285 Ga. 251, 674 S.E.2d 884 (2009).

Mere possession of limited quantities of controlled substance within structure. — In order to support a conviction under O.C.G.A. § 16-13-42(a)(5) for maintaining a residence or other structure or place used for keeping controlled substances, the evidence must show that one of the purposes for maintaining the structure was the keeping of the controlled substance; thus, the mere possession of limited quantities of a controlled substance within the residence or structure is insufficient to support a conviction

under paragraph (a)(5). *Barnes v. State*, 255 Ga. 396, 339 S.E.2d 229 (1986).

Something more than isolated instance of proscribed activity required. — In order to support a conviction under O.C.G.A. § 16-13-42 for maintaining a residence or other structure or place used for selling controlled substances, the evidence must be sufficient to support a finding of something more than a single, isolated instance of the proscribed activity. *Barnes v. State*, 255 Ga. 396, 339 S.E.2d 229 (1986).

Evidence found on single occasion may show continuing crime. — In prosecutions under O.C.G.A. § 16-13-42(a)(5), there is no inflexible rule that evidence found in a store, shop, etc., only on a single occasion cannot be sufficient to show a crime of a continuing nature. *Barnes v. State*, 255 Ga. 396, 339 S.E.2d 229 (1986).

Cited in *White v. State*, 146 Ga. App. 810, 247 S.E.2d 536 (1978); *Little v. State*, 157 Ga. App. 462, 278 S.E.2d 17 (1981); *Barnes v. State*, 175 Ga. App. 621, 334 S.E.2d 205 (1985); *Warren v. State*, 289 Ga. App. 481, 657 S.E.2d 533 (2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Drugs and Controlled Substances, §§ 19 et seq., 47, 50, 162, 187.

C.J.S. — 28 C.J.S., Drugs and Narcotics, §§ 188, 189, 196, 210 et seq., 263 et seq.

U.L.A. — Uniform Controlled Substances Act (U.L.A.) § 402.

ALR. — What constitutes "possession" of a narcotic drug proscribed by § 2 of the

Uniform Narcotic Drug Act, 91 ALR2d 810.

Offense of aiding and abetting illegal possession of drugs or narcotics, 47 ALR3d 1239.

Permitting unlawful use of narcotics in private home as criminal offense, 54 ALR3d 1297.

Validity and construction of statute creating presumption or inference of intent to

sell from possession of specified quantity of illegal drugs, 60 ALR3d 1128.

Common-law right of action for damage sustained by plaintiff in consequence of sale or gift of intoxicating liquor or habit-forming drug to another, 97 ALR3d 528; 62 ALR4th 16.

Narcotics conviction as crime of moral turpitude justifying disbarment or other disciplinary action against attorney, 99 ALR3d 288.

Criminal responsibility for physical

measures undertaken in connection with treatment of mentally disordered patient, 99 ALR3d 854.

Social host's liability for injuries incurred by third parties as a result of intoxicated guest's negligence, 62 ALR4th 16.

Validity, construction, and application of state or local law prohibiting maintenance of vehicle for purpose of keeping or selling controlled substances, 31 ALR5th 760.

16-13-43. Unauthorized distribution; penalties.

(a) It is unlawful for any person:

(1) Who is a registrant to distribute a controlled substance classified in Schedule I or II, except pursuant to an order form as required by Code Section 16-13-40;

(2) To use, in the course of the manufacture or distribution of a controlled substance, a registration number which is fictitious, revoked, suspended, or issued to another person;

(3) To acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, subterfuge, or theft;

(4) To furnish false or fraudulent material information in, or omit any material information from, any application, report, or other document or record required to be kept or filed under this article;

(5) To make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing, upon any drug or container or labeling thereof so as to render the drug a counterfeit substance; or

(6) To withhold information from a practitioner that such person has obtained a controlled substance of a similar therapeutic use in a concurrent time period from another practitioner.

(b) Any person who violates this Code section is guilty of a felony and, upon conviction thereof, may be imprisoned for not more than eight years or fined not more than \$50,000.00, or both. (Code 1933, § 79A-819, enacted by Ga. L. 1967, p. 296, § 1; Code 1933, § 79A-822, enacted by Ga. L. 1974, p. 221, § 1; Ga. L. 1978, p. 1668, § 11; Ga. L. 1985, p. 1219, § 6; Ga. L. 1987, p. 261, § 6.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
FORGED PRESCRIPTIONS

General Consideration

Cited in *Barner v. State*, 139 Ga. App. 50, 227 S.E.2d 874 (1976); *Elrod v. State*, 143 Ga. App. 331, 238 S.E.2d 291 (1977); *Goldsmith v. State*, 148 Ga. App. 786, 252 S.E.2d 657 (1979); *Little v. State*, 157 Ga. App. 462, 278 S.E.2d 17 (1981); *Smith v. State*, 221 Ga. App. 670, 472 S.E.2d 503 (1996).

Forged Prescriptions

Acquiring possession of controlled substance through forged prescription is essence of O.C.G.A. § 16-13-43(a)(3). *State v. O'Neal*, 156 Ga. App. 384, 274 S.E.2d 575 (1980).

O.C.G.A. § 16-13-43(a)(3) did not repeal O.C.G.A. § 16-9-1 by implication. — Repeal by implication is not favored, and if later Act does not embrace whole subject matter of prior Act and is not entirely repugnant to it, the court should apply a construction that will give the two statutes concurrent efficacy. *State v. O'Neal*, 156 Ga. App. 384, 274 S.E.2d 575 (1980).

Prosecution for violation of paragraph (a)(3) as bar to reindictment

and reprosecution. — If former Code 1933, § 79A-822 (see O.C.G.A. § 16-13-43) was exclusive section to be applied in a given case, former Code 1933, § 26-1701 (see O.C.G.A. § 16-9-1) still generally proscribed part of same conduct, and any attempt to reindict and reprosecute would be barred by a plea of former jeopardy under former Code 1933, § 26-507 (see O.C.G.A. § 16-1-8). *State v. O'Neal*, 156 Ga. App. 384, 274 S.E.2d 575 (1980).

New trial properly denied. — Since the jury was properly instructed as to the charged offense of criminal attempt to obtain possession of a controlled substance by forgery, the defendant did not request that the word "forgery" be defined, and the defendant did not take the position that forgery was a lesser-included offense of the crime of attempting to obtain possession of a controlled substance by forgery, a new trial was properly denied; further, the term "forgery" was not so obscure or technical that it required the court to sua sponte define the term for the jury. *Sosebee v. State*, 282 Ga. App. 905, 640 S.E.2d 379 (2006).

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Drugs and Controlled Substances, §§ 19 et seq., 47, 50, 162, 187.

C.J.S. — 28 C.J.S., Drugs and Narcotics, §§ 188, 189, 196, 263, 269.

U.L.A. — Uniform Controlled Substances Act (U.L.A.) § 403.

ALR. — What constitutes "possession" of a narcotic drug proscribed by § 2 of the Uniform Narcotic Drug Act, 91 ALR2d 810.

Offense of aiding and abetting illegal possession of drugs or narcotics, 47 ALR3d 1239.

Validity and construction of statute creating presumption or inference of intent to

sell from possession of specified quantity of illegal drugs, 60 ALR3d 1128.

Common-law right of action for damage sustained by plaintiff in consequence of sale or gift of intoxicating liquor or habit-forming drug to another, 97 ALR3d 528; 62 ALR4th 16.

Criminal responsibility for physical measures undertaken in connection with treatment of mentally disordered patient, 99 ALR3d 854.

Social host's liability for injuries incurred by third parties as a result of intoxicated guest's negligence, 62 ALR4th 16.

16-13-44. Penalties under other laws.

Any penalty imposed for violation of this article is in addition to, and not in lieu of, any civil or administrative penalty or sanction otherwise authorized by law. (Code 1933, § 79A-823, enacted by Ga. L. 1974, p. 221, § 1.)

JUDICIAL DECISIONS

Cited in *Head v. State*, 160 Ga. App. 4, 285 S.E.2d 735 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Drugs and Controlled Substances, § 199.

C.J.S. — 28A C.J.S., Drugs and Narcotics, § 489, 495.

U.L.A. — Uniform Controlled Substances Act (U.L.A.) § 404.

ALR. — Liability of druggist for injury in consequence of mistake, 31 ALR 1336; 44 ALR 1482.

Liability of druggist for punitive damages, 31 ALR 1362.

Narcotics conviction as crime of moral turpitude justifying disbarment or other disciplinary action against attorney, 99 ALR3d 288.

Druggist's civil liability for injuries sustained as result of negligence in incorrectly filling drug prescriptions, 3 ALR4th 270.

16-13-45. Powers of enforcement personnel.

Any officer or employee of the State Board of Pharmacy designated by the director of the Georgia Drugs and Narcotics Agency may:

- (1) Carry firearms in the performance of his official duties;
- (2) Execute and serve search warrants, arrest warrants, administrative inspection warrants, subpoenas, and summonses issued under the authority of this state;
- (3) Make arrests without warrant for any offense under this article committed in his presence or if he has probable cause to believe that the person to be arrested has committed or is committing a violation of this article which may constitute a felony;
- (4) Make seizures of property pursuant to this article; or
- (5) Perform other law enforcement duties as the State Board of Pharmacy or the director of the Georgia Drugs and Narcotics Agency designates. (Code 1933, § 79A-824, enacted by Ga. L. 1974, p. 221, § 1; Ga. L. 1982, p. 3, § 16.)

Cross references. — Enforcement powers of director of Georgia Drugs and Narcotics Agency under article generally, § 26-4-29.

JUDICIAL DECISIONS

Cited in *Diamond v. Marland*, 395 F. Supp. 432 (S.D. Ga. 1975).

OPINIONS OF THE ATTORNEY GENERAL

Control of dangerous drugs is vested with State Board of Pharmacy and chief inspector (now director of Georgia Drugs and Narcotics Agency). 1975 Op. Att'y Gen. No. 75-23.

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Drugs and Controlled Substances, § 194.
C.J.S. — 22 C.J.S., Criminal Law, § 447. 94 C.J.S., Weapons, § 22 et seq. 28 C.J.S., Drugs and Narcotics, §§ 69, 70. 79 C.J.S., Searches and Seizures, § 128 et seq. 97 C.J.S., Witnesses, § 23.
U.L.A. — Uniform Controlled Substances Act (U.L.A.) § 501.

16-13-46. Administrative inspections and warrants.

(a) Issuance and execution of inspection warrants shall be as follows:

(1) A judge of the superior, state, city, or magistrate court, or any municipal officer clothed by law with the powers of a magistrate, upon proper oath or affirmation showing probable cause, may issue warrants for the purpose of conducting inspections authorized by this article, or rules promulgated under this article, and seizures of property appropriate to the inspections. For the purpose of the issuance of inspection warrants, probable cause exists upon showing a valid public interest in the effective enforcement of this article, or rules promulgated under this article, sufficient to justify inspection of the area, premises, building, or conveyance in the circumstances specified in the application for the warrant;

(2) A warrant shall issue only upon an affidavit of a designated officer, drug agent, or employee of the State Board of Pharmacy having knowledge of the facts alleged, sworn to before the judicial officer and establishing the grounds for issuing the warrant. If the judicial officer is satisfied that grounds for the application exist or that there is probable cause to believe they exist, he shall issue a warrant identifying the area, premises, building, registrant, or conveyance to be inspected, the purpose of the inspection, and, if appropriate, the type of property to be inspected, if any. The warrant shall:

(A) State the grounds for its issuance and the name of each person whose affidavit has been taken in support thereof;

(B) Be directed to persons authorized by Code Section 16-13-45 to execute it;

(C) Command the persons to whom it is directed to inspect the area, premises, building, registrant, or conveyance identified for the purpose specified and, if appropriate, direct the seizure of the property specified;

(D) Identify the item or types of property to be seized, if any; and

(E) Designate the judicial officer to whom it shall be returned;

(3) A warrant issued pursuant to this Code section must be executed and returned within ten days of its date unless, upon a showing of a need for additional time, the court orders otherwise. If property is seized pursuant to a warrant, a copy shall be provided upon request to the person from whom or from whose premises the property is taken, together with a receipt for the property taken. The return of the warrant shall be made promptly, accompanied by a written inventory of any property taken. A copy of the inventory shall be delivered upon request to the person from whom or from whose premises the property was taken and to the applicant for the warrant; and

(4) The judicial officer who has issued a warrant shall attach thereto a copy of the return and all papers returnable in connection therewith and file them with the clerk of the superior court for the county in which the inspection was made.

(b) The State Board of Pharmacy, the director of the Georgia Drugs and Narcotics Agency or drug agents may make inspections of controlled premises in accordance with the following provisions:

(1) For purposes of this Code section only, "controlled premises" means:

(A) Places where persons registered or exempted from registration requirements under this article are required to keep records; and

(B) Places, including factories, warehouses, establishments, and conveyances, in which persons registered or exempted from registration requirements under this article are permitted to hold, manufacture, compound, process, sell, deliver, or otherwise dispose of any controlled substance;

(2) When authorized by an inspection warrant issued pursuant to subsection (a) of this Code section, an officer or employee designated by the State Board of Pharmacy or the director of the Georgia Drugs and Narcotics Agency, upon presenting the warrant and appropriate credentials to the owner, operator, or agent in charge, may enter controlled premises for the purpose of conducting an inspection;

(3) When authorized by an inspection warrant, an officer or employee designated by the State Board of Pharmacy or the director of the Georgia Drugs and Narcotics Agency may:

(A) Inspect and copy records required by this article to be kept;

(B) Inspect, within reasonable limits and in a reasonable manner, controlled premises and all pertinent equipment, finished and unfinished material, containers, and labeling found therein, and, except as provided in paragraph (5) of subsection (b) of this Code section, all other things therein, including records, files, papers, processes, controls, and facilities bearing on violation of this article; and

(C) Inventory any stock of any controlled substance therein and obtain samples thereof;

(4) This Code section does not prevent the inspection without a warrant of books and records pursuant to an administrative inspection in accordance with subsection (c) of this Code section, nor does it prevent entries and inspections, including seizures of property, without a warrant:

(A) If the owner, operator, or agent in charge of the controlled premises consents;

(B) In situations presenting imminent danger to health or safety;

(C) In situations involving inspection of conveyance if there is reasonable cause to believe that the mobility of the conveyance makes it impracticable to obtain a warrant;

(D) In any other exceptional or emergency circumstance where time or opportunity to apply for a warrant is lacking; or

(E) In all other situations in which a warrant is not constitutionally required; and

(5) An inspection authorized by this Code section shall not extend to financial data, sales data other than shipment data, or pricing data unless the owner, operator, or agent in charge of the controlled premises consents in writing.

(c) The State Board of Pharmacy, its members, or duly authorized agents or drug agents shall have the power to inspect, without a warrant, in a lawful manner at all reasonable hours, any pharmacy or other place licensed by the State Board of Pharmacy pursuant to Chapter 4 of Title 26 for the purpose:

(1) Of determining if any of the provisions of this article or any rule or regulation promulgated under its authority is being violated;

(2) Of securing samples or specimens of any drug or medical supplies, after first paying or offering to pay for such samples or specimens; and

(3) Of securing other such evidence as may be needed for an administrative proceedings action, as provided by this article. (Code 1933, § 79A-825, enacted by Ga. L. 1974, p. 221, § 1; Ga. L. 1982, p. 3, § 16; Ga. L. 1983, p. 884, § 3-16; Ga. L. 1992, p. 6, § 16; Ga. L. 1999, p. 81, § 16; Ga. L. 2011, p. 752, § 16/HB 142.)

The 2011 amendment, effective May 13, 2011, part of an Act to revise, modernize, and correct the Code, added "and" at

the end of paragraph (a)(3) and subparagraph (b)(4)(E).

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Drugs and Controlled Substances, § 194.

C.J.S. — 28 C.J.S., Drugs and Narcotics, §§ 69, 70, 225, 226. 79 C.J.S., Searches and Seizures, § 128 et seq.

U.L.A. — Uniform Controlled Substances Act (U.L.A.) § 502.

ALR. — Entrapment to commit offense with respect to narcotics law, 33 ALR2d 883.

16-13-47. Injunctions.

(a) The superior courts of this state may exercise jurisdiction to restrain or enjoin violations of this article.

(b) The defendant may demand a trial by jury for an alleged violation of an injunction or restraining order under this Code section. (Code 1933, § 79A-826, enacted by Ga. L. 1974, p. 221, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Drugs and Controlled Substances, § 208. 47 Am. Jur. 2d, Jury, § 82.

C.J.S. — 28 C.J.S., Drugs and Narcot-

ics, § 145. 43A C.J.S., Injunctions, §§ 276, 430, 431. 50 C.J.S., Juries, § 35.

U.L.A. — Uniform Controlled Substances Act (U.L.A.) § 503.

16-13-48. Cooperative arrangements with federal and other state agencies.

(a) The State Board of Pharmacy shall cooperate with federal and other state agencies in discharging its responsibilities concerning traffic in controlled substances and in suppressing the abuse of controlled substances. To this end, it may:

(1) Arrange for the exchange of information among governmental officials concerning the use and abuse of controlled substances;

(2) Coordinate and cooperate in training programs concerning controlled substance law enforcement at local and state levels;

(3) Cooperate with the bureau by establishing a centralized unit to accept, catalogue, file, and collect statistics, including records, other than medical treatment records, of drug dependent persons and other controlled substance law offenders within the state, and make the information available for federal, state, and local law enforcement purposes; and

(4) Conduct or promote programs of eradication aimed at destroying wild or illicit growth of plant species from which controlled substances may be extracted.

(b) Results, information, and evidence received from the bureau relating to the regulatory functions of this article, including results of inspections conducted by it, may be relied and acted upon by the State Board of Pharmacy or drug agents in the exercise of its or their regulatory functions under this article. (Code 1933, § 79A-827, enacted by Ga. L. 1967, p. 296, § 1; Ga. L. 1974, p. 221, § 1; Ga. L. 1982, p. 3, § 16.)

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Drugs and Controlled Substances, § 209 et seq.

C.J.S. — 98 C.J.S., Witnesses, § 341.

U.L.A. — Uniform Controlled Substances Act (U.L.A.) § 504.

ALR. — Federal prosecutions based on manufacture, importation, transportation, possession, sale, or use of LSD, 22 ALR3d 1325.

16-13-48.1. Funds or property transferred to state or local agencies under federal drug laws.

Money or property seized or forfeited pursuant to federal law regarding controlled substances, marijuana, or dangerous drugs, which money, property, or proceeds therefrom are authorized by that federal law to be transferred to a cooperating law enforcement agency of this state or any political subdivision thereof, shall be utilized by the law enforcement agency or political subdivision to which the money, property, or proceeds are so transferred as provided by such federal law and regulations thereunder. Unless otherwise required by federal law or regulation, such funds shall be received and utilized as provided by Georgia law. (Code 1981, § 16-13-48.1, enacted by Ga. L. 1987, p. 840, § 1.)

Law reviews. — For survey article on local government law, see 59 Mercer L. Rev. 285 (2007).

JUDICIAL DECISIONS

Cited in Hill v. Clayton County Bd. of Comm'rs, 283 Ga. App. 15, 640 S.E.2d 638 (2006).

OPINIONS OF THE ATTORNEY GENERAL

National Guard is eligible to share in proceeds of drug-related forfeitures with respect to statutorily authorized activities. 1995 Op. Att'y Gen. No. 95-29.

Use of federal forfeiture funds. —

Under O.C.G.A. §§ 16-13-48.1 and 16-13-49(u)(4)(D)(i), federal forfeiture funds may not be used to pay the salaries of law enforcement officers including overtime pay and other benefits. 2002 Op. Att'y Gen. No. 2002-5.

16-13-49. Forfeitures.

(a) As used in this Code section, the term:

(1) "Controlled substance" shall have the same meaning as provided in paragraph (4) of Code Section 16-13-21 and shall also include marijuana as such term is defined in paragraph (16) of Code Section 16-13-21, notwithstanding any other provisions of this article.

(2) "Costs" means, but is not limited to:

(A) All expenses associated with the seizure, towing, storage, maintenance, custody, preservation, operation, or sale of the property; and

(B) Satisfaction of any security interest or lien not subject to forfeiture under this Code section.

(3) "Court costs" means, but is not limited to:

(A) All court costs, including the costs of advertisement, transcripts, and court reporter fees; and

(B) Payment of receivers, conservators, appraisers, accountants, or trustees appointed by the court pursuant to this Code section.

(4) "Enterprise" means any person, sole proprietorship, partnership, corporation, trust, association, or other legal entity created under the laws of this state, of the United States or any of the several states of the United States, or of any foreign nation or a group of individuals associated in fact although not a legal entity and includes illicit as well as licit enterprises and governmental as well as other entities.

(5) "Governmental agency" means any department, office, council, commission, committee, authority, board, bureau, or division of the executive, judicial, or legislative branch of a state, the United States, or any political subdivision thereof.

(6) "Interest holder" means a secured party within the meaning of Code Section 11-9-102 or the beneficiary of a perfected encumbrance pertaining to an interest in property.

(7) "Owner" means a person, other than an interest holder, who has an interest in property and is in compliance with any statute requiring its recordation or reflection in public records in order to perfect the interest against a bona fide purchaser for value.

(8) "Proceeds" means property derived directly or indirectly from, maintained by, or realized through an act or omission and includes any benefit, interest, or property of any kind without reduction for expenses incurred for acquisition, maintenance, or any other purpose.

(9) "Property" means anything of value and includes any interest in anything of value, including real property and any fixtures thereon, and tangible and intangible personal property, including but not limited to currency, instruments, securities, or any other kind of privilege, interest, claim, or right.

(10) "United States" includes its territories, possessions, and dominions and the District of Columbia.

(b)(1) An action filed pursuant to this Code section shall be filed in the name of the State of Georgia and may be brought:

(A) In the case of an in rem action, by the district attorney for the judicial circuit where the property is located;

(B) In the case of an in personam action, by the district attorney for the judicial circuit in which the defendant resides; or

(C) By the district attorney having jurisdiction over any offense which arose out of the same conduct which made the property subject to forfeiture.

Such district attorney may bring an action pursuant to this Code section in any superior court of this state.

(2) If more than one district attorney has jurisdiction to file an action pursuant to this Code section, the district attorney having primary jurisdiction over a violation of this article shall, in the event of a conflict, have priority over any other district attorney.

(3) Any action brought pursuant to this Code section may be compromised or settled in the same manner as other civil actions.

(c) An action for forfeiture brought pursuant to this Code section shall be tried:

(1) If the action is in rem against real property, in the county where the property is located, except where a single tract is divided by a

county line, in which case the superior court of either county shall have jurisdiction;

(2) If the action is in rem against tangible or intangible personal property, in any county where the property is located or will be during the pendency of the action; or

(3) If the action is in personam, as provided by law.

(d) The following are declared to be contraband and no person shall have a property right in them:

(1) All controlled substances, raw materials, or controlled substance analogs that have been manufactured, distributed, dispensed, possessed, or acquired in violation of this article;

(2) All property which is, directly or indirectly, used or intended for use in any manner to facilitate a violation of this article or any proceeds derived or realized therefrom;

(3) All property located in this state which was, directly or indirectly, used or intended for use in any manner to facilitate a violation of this article or of the laws of the United States or any of the several states relating to controlled substances which is punishable by imprisonment for more than one year or any proceeds derived or realized therefrom;

(4) All weapons possessed, used, or available for use in any manner to facilitate a violation of this article or any of the laws of the United States or any of the several states relating to controlled substances which is punishable by imprisonment for more than one year;

(5) Any interest, security, claim, or property or contractual right of any kind affording a source of influence over any enterprise that a person has established, operated, controlled, conducted, or participated in the conduct of in violation of this article or any of the laws of the United States or any of the several states relating to controlled substances which is punishable by imprisonment for more than one year or any proceeds derived or realized therefrom; and

(6) All moneys, negotiable instruments, securities, or other things of value which are found in close proximity to any controlled substance or marijuana or other property which is subject to forfeiture under this subsection.

(e)(1) A property interest shall not be subject to forfeiture under this Code section if the owner of such interest or interest holder establishes that the owner or interest holder:

(A) Is not legally accountable for the conduct giving rise to its forfeiture, did not consent to it, and did not know and could not reasonably have known of the conduct or that it was likely to occur;

(B) Had not acquired and did not stand to acquire substantial proceeds from the conduct giving rise to its forfeiture other than as an interest holder in an arm's length commercial transaction;

(C) With respect to conveyances for transportation only, did not hold the property jointly, in common, or in community with a person whose conduct gave rise to its forfeiture;

(D) Does not hold the property for the benefit of or as nominee for any person whose conduct gave rise to its forfeiture, and, if the owner or interest holder acquired the interest through any such person, the owner or interest holder acquired it as a bona fide purchaser for value without knowingly taking part in an illegal transaction; and

(E) Acquired the interest:

(i) Before the completion of the conduct giving rise to its forfeiture, and the person whose conduct gave rise to its forfeiture did not have the authority to convey the interest to a bona fide purchaser for value at the time of the conduct; or

(ii) After the completion of the conduct giving rise to its forfeiture:

(I) As a bona fide purchaser for value without knowingly taking part in an illegal transaction;

(II) Before the filing of a lien on it and before the effective date of a notice of pending forfeiture relating to it and without notice of its seizure for forfeiture under this article; and

(III) At the time the interest was acquired, was reasonably without cause to believe that the property was subject to forfeiture or likely to become subject to forfeiture under this article.

(2) A property interest shall not be subject to forfeiture under this Code section for a violation involving only one gram or less of a mixture containing cocaine or four ounces or less of marijuana unless said property was used to facilitate a transaction in or a purchase of or sale of a controlled substance or marijuana.

(f) A rented or leased vehicle shall not be subject to forfeiture unless it is established in forfeiture proceedings that the owner of the rented or leased vehicle is legally accountable for the conduct which would otherwise subject the vehicle to forfeiture, consented to the conduct, or knew or reasonably should have known of the conduct or that it was likely to occur. Upon learning of the address or phone number of the company which owns any rented or leased vehicle which is present at the scene of an arrest or other action taken pursuant to this Code

section, the duly authorized authorities shall immediately contact the company to inform it that the vehicle is available for the company to take possession.

(g)(1) Property which is subject to forfeiture under this Code section may be seized by the director of the Georgia Drugs and Narcotics Agency or any duly authorized agent or drug agent of this state or by any law enforcement officer of this state or of any political subdivision thereof who has power to make arrests or execute process or a search warrant issued by any court having jurisdiction over the property. A search warrant authorizing seizure of property which is subject to forfeiture pursuant to this Code section may be issued on an affidavit demonstrating that probable cause exists for its forfeiture or that the property has been the subject of a previous final judgment of forfeiture in the courts of this state, any other state, or the United States. The court may order that the property be seized on such terms and conditions as are reasonable.

(2) Property which is subject to forfeiture under this Code section may be seized without process if there is probable cause to believe that the property is subject to forfeiture under this article or the seizure is incident to an arrest or search pursuant to a search warrant or to an inspection under an inspection warrant.

(3) The court's jurisdiction over forfeiture proceedings is not affected by a seizure in violation of the Constitution of Georgia or the United States Constitution made with process or in a good faith belief of probable cause.

(h)(1) When property is seized pursuant to this article, the sheriff, drug agent, or law enforcement officer seizing the same shall report the fact of seizure, in writing, within 20 days thereof to the district attorney of the judicial circuit having jurisdiction in the county where the seizure was made.

(2) Within 60 days from the date of seizure, a complaint for forfeiture shall be initiated as provided for in subsection (n), (o), or (p) of this Code section.

(3) If the state fails to initiate forfeiture proceedings against property seized for forfeiture by notice of pending forfeiture within the time limits specified in paragraphs (1) and (2) of this subsection, the property must be released on the request of an owner or interest holder, pending further proceedings pursuant to this Code section, unless the property is being held as evidence.

(i)(1) Seizure of property by a law enforcement officer constitutes notice of such seizure to any person who was present at the time of seizure who may assert an interest in the property.

(2) When property is seized pursuant to this article, the district attorney or the sheriff, drug agent, or law enforcement officer seizing the same shall give notice of the seizure to any owner or interest holder who is not present at the time of seizure by personal service, publication, or the mailing of written notice:

(A) If the owner's or interest holder's name and current address are known, by either personal service or mailing a copy of the notice by certified mail or statutory overnight delivery to that address;

(B) If the owner's or interest holder's name and address are required by law to be on record with a government agency to perfect an interest in the property but the owner's or interest holder's current address is not known, by mailing a copy of the notice by certified mail or statutory overnight delivery, return receipt requested, to any address on the record; or

(C) If the owner's or interest holder's address is not known and is not on record as provided in subparagraph (B) of this paragraph or the owner's or interest holder's interest is not known, by publication in two consecutive issues of a newspaper of general circulation in the county in which the seizure occurs.

(3) Notice of seizure must include a description of the property, the date and place of seizure, the conduct giving rise to forfeiture, and the violation of law alleged.

(j) A district attorney may file, without a filing fee, a lien for forfeiture of property upon the initiation of any civil or criminal proceeding under this article or upon seizure for forfeiture. The filing constitutes notice to any person claiming an interest in the property owned by the named person. The filing shall include the following:

(1) The lien notice must set forth:

(A) The name of the person and, in the discretion of the state, any alias and any corporations, partnerships, trusts, or other entities, including nominees, that are either owned entirely or in part or controlled by the person; and

(B) The description of the property, the criminal or civil proceeding that has been brought under this article, the amount claimed by the state, the name of the court where the proceeding or action has been brought, and the case number of the proceeding or action if known at the time of filing;

(2) A lien under this subsection applies to the described property and to one named person and to any aliases, fictitious names, or other names, including names of corporations, partnerships, trusts, or other entities, that are either owned entirely or in part or controlled

by the named person and any interest in real property owned or controlled by the named person. A separate lien for forfeiture of property must be filed for any other person;

(3) The lien creates, upon filing, a lien in favor of the state as it relates to the seized property or to the named person or related entities with respect to said property. The lien secures the amount of potential liability for civil judgment and, if applicable, the fair market value of seized property relating to all proceedings under this article enforcing the lien. The forfeiture lien referred to in this subsection must be filed in accordance with the provisions of the laws in this state pertaining to the type of property that is subject to the lien. The state may amend or release, in whole or in part, a lien filed under this subsection at any time by filing, without a filing fee, an amended lien in accordance with this subsection which identifies the lien amended. The state, as soon as practical after filing a lien, shall furnish to any person named in the lien a notice of the filing of the lien. Failure to furnish notice under this subsection does not invalidate or otherwise affect a lien filed in accordance with this subsection;

(4) Upon entry of judgment in favor of the state, the state may proceed to execute on the lien as in the case of any other judgment;

(5) A trustee, constructive or otherwise, who has notice that a lien for forfeiture of property, a notice of pending forfeiture, or a civil forfeiture proceeding has been filed against the property or against any person or entity for whom the person holds title or appears as the owner of record shall furnish, within ten days, to the district attorney or his designee the following information:

(A) The name and address of the person or entity for whom the property is held;

(B) The names and addresses of all beneficiaries for whose benefit legal title to the seized property, or property of the named person or related entity, is held; and

(C) A copy of the applicable trust agreement or other instrument, if any, under which the trustee or other person holds legal title or appears as the owner of record of the property; and

(6) A trustee, constructive or otherwise, who fails to comply with this subsection shall be guilty of a misdemeanor.

(k) Property taken or detained under this Code section is not subject to replevin, conveyance, sequestration, or attachment. The seizing law enforcement agency or the district attorney may authorize the release of the property if the forfeiture or retention is unnecessary or may transfer the action to another agency or district attorney by discontinuing forfeiture proceedings in favor of forfeiture proceedings initiated by

the other law enforcement agency or district attorney. An action under this Code section may be consolidated with any other action or proceeding under this article relating to the same property on motion by an interest holder and must be so consolidated on motion by the district attorney in either proceeding or action. The property is deemed to be in the custody of the State of Georgia subject only to the orders and decrees of the superior court having jurisdiction over the forfeiture proceedings.

(1)(1) If property is seized under this article, the district attorney may:

(A) Remove the property to a place designated by the superior court having jurisdiction over the forfeiture proceeding;

(B) Place the property under constructive seizure by posting notice of pending forfeiture, by giving notice of pending forfeiture to its owners and interest holders, or by filing notice of seizure in any appropriate public record relating to the property;

(C) Remove the property to a storage area, within the jurisdiction of the court, for safekeeping or, if the property is a negotiable instrument or money and is not needed for evidentiary purposes, the district attorney may authorize its being deposited in an interest-bearing account in a financial institution in this state. Any accrued interest shall follow the principal in any judgment with respect thereto;

(D) Provide for another governmental agency, a receiver appointed by the court pursuant to Chapter 8 of Title 9, an owner, or an interest holder to take custody of the property and remove it to an appropriate location within the county where the property was seized; or

(E) Require the sheriff or chief of police of the political subdivision where the property was seized to take custody of the property and remove it to an appropriate location for disposition in accordance with law.

(2) If any property which has been attached or seized pursuant to this Code section is perishable or is liable to perish, waste, or be greatly reduced in value by keeping or if the expense of keeping the same is excessive or disproportionate to the value thereof, the court, upon motion of the state, a claimant, or the custodian, may order the property or any portion thereof to be sold upon such terms and conditions as may be prescribed by the court; and the proceeds shall be paid into the registry of the court pending final disposition of the action.

(m) As soon as possible, but not more than 30 days after the seizure of property, the seizing law enforcement agency shall conduct an inventory and estimate the value of the property seized.

(n) If the estimated value of personal property seized is \$25,000.00 or less, the district attorney may elect to proceed under the provisions of this subsection in the following manner:

(1) Notice of the seizure of such property shall be posted in a prominent location in the courthouse of the county in which the property was seized. Such notice shall include a description of the property, the date and place of seizure, the conduct giving rise to forfeiture, a statement that the owner of such property has 30 days within which a claim must be filed, and the violation of law alleged;

(2) A copy of the notice, which shall include a statement that the owner of such property has 30 days within which a claim must be filed, shall be served upon an owner, interest holder, or person in possession of the property at the time of seizure as provided in subsection (i) of this Code section and shall be published for at least three successive weeks in a newspaper of general circulation in the county where the seizure was made;

(3) The owner or interest holder may file a claim within 30 days after the second publication of the notice of forfeiture by sending the claim to the seizing law enforcement agency and to the district attorney by certified mail or statutory overnight delivery, return receipt requested;

(4) The claim must be signed by the owner or interest holder under penalty of perjury and must set forth:

(A) The caption of the proceedings as set forth on the notice of pending forfeiture and the name of the claimant;

(B) The address at which the claimant will accept mail;

(C) The nature and extent of the claimant's interest in the property;

(D) The date, identity of the transferor, and circumstances of the claimant's acquisition of the interest in the property;

(E) The specific provision of this Code section relied on in asserting that the property is not subject to forfeiture;

(F) All essential facts supporting each assertion; and

(G) The precise relief sought;

(5) If a claim is filed, the district attorney shall file a complaint for forfeiture as provided in subsection (o) or (p) of this Code section

within 30 days of the actual receipt of the claim. A person who files a claim shall be joined as a party; and

(6) If no claim is filed within 30 days after the second publication of the notice of forfeiture, all right, title, and interest in the property is forfeited to the state and the district attorney shall dispose of the property as provided in subsection (u) of this Code section.

(o) In rem proceedings.

(1) In actions in rem, the property which is the subject of the action shall be named as the defendant. The complaint shall be verified on oath or affirmation by a duly authorized agent of the state in a manner required by the laws of this state. Such complaint shall describe the property with reasonable particularity; state that it is located within the county or will be located within the county during the pendency of the action; state its present custodian; state the name of the owner or interest holder, if known; allege the essential elements of the violation which is claimed to exist; state the place of seizure, if the property was seized; and conclude with a prayer of due process to enforce the forfeiture.

(2) A copy of the complaint and summons shall be served on any person known to be an owner or interest holder and any person who is in possession of the property.

(A) Service of the complaint and summons shall be as provided in subsections (a), (b), (c), and (e) of Code Section 9-11-4.

(B) If real property is the subject of the action or the owner or interest holder is unknown or resides out of the state or departs the state or cannot after due diligence be found within the state or conceals himself so as to avoid service, notice of the proceeding shall be published once a week for two successive weeks in the newspaper in which the sheriff's advertisements are published. Such publication shall be deemed notice to any and all persons having an interest in or right affected by such proceeding and from any sale of the property resulting therefrom, but shall not constitute notice to an interest holder unless that person is unknown or resides out of the state or departs the state or cannot after due diligence be found within the state or conceals himself to avoid service.

(C) If tangible property which has not been seized is the subject of the action, the court may order the sheriff or another law enforcement officer to take possession of the property. If the character or situation of the property is such that the taking of actual possession is impracticable, the sheriff shall execute process by affixing a copy of the complaint and summons to the property in

a conspicuous place and by leaving another copy of the complaint and summons with the person having possession or his agent. In cases involving a vessel or aircraft, the sheriff or other law enforcement officer is authorized to make a written request with the appropriate governmental agency not to permit the departure of such vessel or aircraft until notified by the sheriff or his deputy that the vessel or aircraft has been released.

(3) An owner of or interest holder in the property may file an answer asserting a claim against the property in the action in rem. Any such answer shall be filed within 30 days after the service of the summons and complaint. Where service is made by publication and personal service has not been made, an owner or interest holder shall file an answer within 30 days of the date of final publication. An answer must be verified by the owner or interest holder under penalty of perjury. In addition to complying with the general rules applicable to an answer in civil actions, the answer must set forth:

(A) The caption of the proceedings as set forth in the complaint and the name of the claimant;

(B) The address at which the claimant will accept mail;

(C) The nature and extent of the claimant's interest in the property;

(D) The date, identity of transferor, and circumstances of the claimant's acquisition of the interest in the property;

(E) The specific provision of this Code section relied on in asserting that the property is not subject to forfeiture;

(F) All essential facts supporting each assertion; and

(G) The precise relief sought.

(4) If at the expiration of the period set forth in paragraph (3) of this subsection no answer has been filed, the court shall order the disposition of the seized property as provided for in this Code section.

(5) If an answer is filed, a hearing must be held within 60 days after service of the complaint unless continued for good cause and must be held by the court without a jury.

(6) An action in rem may be brought by the state in addition to or in lieu of any other in rem or in personam action brought pursuant to this title.

(p) In personam proceedings.

(1) The complaint shall be verified on oath or affirmation by a duly authorized agent of the state in a manner required by the laws of this

state. It shall describe with reasonable particularity the property which is sought to be forfeited; state its present custodian; state the name of the owner or interest holder, if known; allege the essential elements of the violation which is claimed to exist; state the place of seizure, if the property was seized; and conclude with a prayer of due process to enforce the forfeiture.

(2) Service of the complaint and summons shall be as follows:

(A) Except as otherwise provided in this subsection, service of the complaint and summons shall be as provided by subsections (a), (b), (c), and (d) of Code Section 9-11-4; and

(B) If the defendant is unknown or resides out of the state or departs the state or cannot after due diligence be found within the state or conceals himself so as to avoid service, notice of the proceedings shall be published once a week for two successive weeks in the newspaper in which the sheriff's advertisements are published. Such publication shall be deemed sufficient notice to any such defendant.

(3) A defendant shall file a verified answer within 30 days after the service of the summons and complaint. Where service is made by publication and personal service has not been made, a defendant shall file such answer within 30 days of the date of final publication. In addition to complying with the general rules applicable to an answer in civil actions, the answer must contain all of the elements set forth in paragraph (3) of subsection (o) of this Code section.

(4) Any interest holder or person in possession of the property may join any action brought pursuant to this subsection as provided by Chapter 11 of Title 9, known as the "Georgia Civil Practice Act."

(5) If at the expiration of the period set forth in paragraph (3) of this subsection no answer has been filed, the court shall order the disposition of the seized property as provided for in this Code section.

(6) If an answer is filed, a hearing must be held within 60 days after service of the complaint unless continued for good cause and must be held by the court without a jury.

(7) On a determination of liability of a person for conduct giving rise to forfeiture under this Code section, the court must enter a judgment of forfeiture of the property described in the complaint and must also authorize the district attorney or his agent or any law enforcement officer or peace officer to seize all property ordered to be forfeited which was not previously seized or was not then under seizure. Following the entry of an order declaring the property forfeited, the court, on application of the state, may enter any

appropriate order to protect the interest of the state in the property ordered to be forfeited.

(8) Except as provided in this subsection, no person claiming an interest in property subject to forfeiture under this Code section may intervene in a trial or appeal of a criminal action or in an in personam civil action involving the forfeiture of the property.

(q) In conjunction with any civil or criminal action brought pursuant to this article:

(1) The court, on application of the district attorney, may enter any restraining order or injunction; require the execution of satisfactory performance bonds; appoint receivers, conservators, appraisers, accountants, or trustees; or take any action to seize, secure, maintain, or preserve the availability of property subject to forfeiture under this article, including issuing a warrant for its seizure and writ of attachment, whether before or after the filing of a complaint for forfeiture;

(2) A temporary restraining order under this Code section may be entered on application of the district attorney, without notice or an opportunity for a hearing, if the district attorney demonstrates that:

(A) There is probable cause to believe that the property with respect to which the order is sought, in the event of final judgment or conviction, would be subject to forfeiture under this title; and

(B) Provision of notice would jeopardize the availability of the property for forfeiture;

(3) Notice of the entry of a restraining order and an opportunity for a hearing must be afforded to persons known to have an interest in the property. The hearing must be held at the earliest possible date consistent with the date set in subsection (b) of Code Section 9-11-65 and is limited to the issues of whether:

(A) There is a probability that the state will prevail on the issue of forfeiture and that failure to enter the order will result in the property's being destroyed, conveyed, encumbered, removed from the jurisdiction of the court, concealed, or otherwise made unavailable for forfeiture; and

(B) The need to preserve the availability of property through the entry of the requested order outweighs the hardship on any owner or interest holder against whom the order is to be entered;

(4) If property is seized for forfeiture or a forfeiture lien is filed without a previous judicial determination of probable cause or order of forfeiture or a hearing under paragraph (2) of this subsection, the court, on an application filed by an owner of or interest holder in the

property within 30 days after notice of its seizure or lien or actual knowledge of such seizure or lien, whichever is earlier, and complying with the requirements for an answer to an in rem complaint, and after five days' notice to the district attorney of the judicial circuit where the property was seized or, in the case of a forfeiture lien, to the district attorney filing such lien, may issue an order to show cause to the seizing law enforcement agency for a hearing on the sole issue of whether probable cause for forfeiture of the property then exists. The hearing must be held within 30 days unless continued for good cause on motion of either party. If the court finds that there is no probable cause for forfeiture of the property, the property must be released pending the outcome of a judicial proceeding which may be filed pursuant to this Code section; and

(5) The court may order property that has been seized for forfeiture to be sold to satisfy a specified interest of any interest holder, on motion of any party, and after notice and a hearing, on the conditions that:

(A) The interest holder has filed a proper claim and:

(i) Is authorized to do business in this state and is under the jurisdiction of a governmental agency of this state or of the United States which regulates financial institutions, securities, insurance, or real estate; or

(ii) Has an interest that the district attorney has stipulated is exempt from forfeiture;

(B) The interest holder must dispose of the property by commercially reasonable public sale and apply the proceeds first to its interest and then to its reasonable expenses incurred in connection with the sale or disposal; and

(C) The balance of the proceeds, if any, must be returned to the actual or constructive custody of the court, in an interest-bearing account, subject to further proceedings under this Code section.

(r) A defendant convicted in any criminal proceeding is precluded from later denying the essential allegations of the criminal offense of which the defendant was convicted in any proceeding pursuant to this Code section, regardless of the pendency of an appeal from that conviction; however, evidence of the pendency of an appeal is admissible. For the purposes of this Code section, a conviction results from a verdict or plea of guilty, including a plea of nolo contendere.

(s) In hearings and determinations pursuant to this Code section:

(1) The court may receive and consider, in making any determination of probable cause or reasonable cause, all evidence admissible in

determining probable cause at a preliminary hearing or by a magistrate pursuant to Article 1 of Chapter 5 of Title 17, together with inferences therefrom;

(2) The fact that money or a negotiable instrument was found in proximity to contraband or to an instrumentality of conduct giving rise to forfeiture authorizes the trier of the fact to infer that the money or negotiable instrument was the proceeds of conduct giving rise to forfeiture or was used or intended to be used to facilitate such conduct; and

(3) There is a rebuttable presumption that any property of a person is subject to forfeiture under this Code section if the state establishes probable cause to believe that:

(A) The person has engaged in conduct giving rise to forfeiture;

(B) The property was acquired by the person during the period of the conduct giving rise to forfeiture or within a reasonable time after the period; and

(C) There was no likely source for the property other than the conduct giving rise to forfeiture.

(t)(1) All property declared to be forfeited under this Code section vests in this state at the time of commission of the conduct giving rise to forfeiture together with the proceeds of the property after that time. Any property or proceeds transferred later to any person remain subject to forfeiture and thereafter must be ordered to be forfeited unless the transferee claims and establishes in a hearing under this Code section that the transferee is a bona fide purchaser for value and the transferee's interest is exempt under subsection (e) of this Code section.

(2) On entry of judgment for a person claiming an interest in the property that is subject to proceedings to forfeit property under this Code section, the court shall order that the property or interest in property be released or delivered promptly to that person free of liens and encumbrances, as provided under this article.

(3) The court shall order a claimant who fails to establish that a substantial portion of the claimant's interest is exempt from forfeiture under subsection (e) of this Code section to pay the reasonable costs relating to the disproving of the claim which were incurred by the state, including costs for investigation, prosecution, and attorneys' fees.

(u)(1) Whenever property is forfeited under this article, any property which is required by law to be destroyed or which is harmful to the public shall, when no longer needed for evidentiary purposes, be

destroyed or forwarded to the Division of Forensic Sciences of the Georgia Bureau of Investigation or any other agency of state or local government for destruction or for any medical or scientific use not prohibited under the laws of the United States or this state.

(2) When property, other than money or real property, is forfeited under this article, the court may:

(A) Order the property to be sold, with the proceeds of the sale to be distributed as provided in paragraph (4) of this subsection; or

(B) Provide for the in-kind distribution of the property as provided for in paragraph (4) of this subsection.

(2.1) When real property is forfeited, the court may order that:

(A) The real property be turned over to the state;

(B) The appropriate political subdivision take charge of the property and:

(i) Sell the property with such conditions as the court deems proper, and distribute the proceeds in such manner as the court so orders; or

(ii) Hold the property for use by one or more law enforcement agencies;

(C) The real property be turned over to an appropriate political subdivision without restrictions;

(D) The real property be deeded to a land bank authority as provided in Article 4 of Chapter 4 of Title 48; or

(E) The real property be disposed of in such other manner as the court deems proper.

(3) Where property is to be sold pursuant to this subsection, the court may direct that such property be sold by:

(A) Judicial sale as provided in Article 7 of Chapter 13 of Title 9; provided, however, that the court may establish a minimum acceptable price for such property; or

(B) Any commercially feasible means, including, but not limited to, in the case of real property, listing such property with a licensed real estate broker, selected by the district attorney through competitive bids.

(4) All money and property forfeited in the same forfeiture proceeding shall be pooled together for distribution as follows:

(A) A fair market value shall be assigned to all items of property other than money in such pool; and a total value shall be estab-

lished for the pool by adding together the fair market value of all such property in the pool and the amount of money in the pool;

(B) All costs, including court costs, shall be paid and the remaining pool shall be distributed pro rata to the state and to local governments, according to the role which their law enforcement agencies played in the seizure of the assets; provided, however, that the amount distributed to the state shall not exceed 25 percent of the amount distributed; county governments are authorized upon request of the district attorney to provide for payment of any and all necessary expenses for the operation of the office from the said forfeiture pool up to 10 percent of the amount distributed, in addition to any other expenses paid by the county to the district attorney's office.

(C) An order of distribution provided for in this subsection shall be submitted by the district attorney to the court for approval; and

(D)(i) Property and money distributed to a local government shall be passed through to the local law enforcement agency until the sum equals $33 \frac{1}{3}$ percent of the amount of local funds appropriated or otherwise made available to such agency for the fiscal year in which such funds are distributed. Proceeds received may be used for any official law enforcement purpose except for the payment of salaries or rewards to law enforcement personnel, at the discretion of the chief officer of the local law enforcement agency, or may be used to fund victim-witness assistance programs or a state law enforcement museum. Such property shall not be used to supplant any other local, state, or federal funds appropriated for staff or operations.

(ii) The local governing authority shall expend any remaining proceeds for any law enforcement purpose; for the representation of indigents in criminal cases; for drug treatment, rehabilitation, prevention, or education or any other program which responds to problems created by drug or substance abuse; for use as matching funds for grant programs related to drug treatment or prevention; to fund victim-witness assistance programs; or for any combination of the foregoing. If real property is distributed to a local government, the local government may transfer the real property to a land bank authority as provided in Article 4 of Chapter 4 of Title 48.

(iii) Any local law enforcement agency receiving property under this subsection shall submit an annual report to the local governing authority. The report shall be submitted with the agency's budget request and shall itemize the property received during the fiscal year and the utilization made thereof.

(iv) Money distributed to the state pursuant to this subsection shall be paid into the general fund of the state treasury, it being the intent of the General Assembly that the same be used, subject to appropriation from the general fund in the manner provided by law for representation of indigents in criminal cases; for funding of the Crime Victims Emergency Fund; for law enforcement and prosecution agency programs and particularly for funding of advanced drug investigation and prosecution training for law enforcement officers and prosecuting attorneys; for drug treatment, rehabilitation, prevention, or education or any other program which responds to problems created by drug or substance abuse; for use as matching funds for grant programs related to drug treatment or prevention; or for financing the judicial system of the state.

(v) Property distributed in kind to the state pursuant to this subsection may be designated by the Attorney General, with the approval of the court, for use by such agency or officer of the state as may be appropriate or, otherwise, shall be turned over to the Department of Administrative Services for such use or disposition as may be determined by the commissioner of the Department of Administrative Services.

(v) An acquittal or dismissal in a criminal proceeding does not preclude civil proceedings under this article.

(w) For good cause shown, the court may stay civil forfeiture proceedings during the criminal trial resulting from a related indictment or information alleging a violation of this article.

(x)(1) The court shall order the forfeiture of any property of a claimant or defendant up to the value of property found by the court to be subject to forfeiture under the provisions of this Code section if any of the forfeited property:

(A) Cannot be located;

(B) Has been transferred or conveyed to, sold to, or deposited with a third party;

(C) Is beyond the jurisdiction of the court;

(D) Has been substantially diminished in value while not in the actual physical custody of the receiver or governmental agency directed to maintain custody of the property; or

(E) Has been commingled with other property that cannot be divided without difficulty.

(2) In addition to any other remedy provided for by law, a district attorney on behalf of the state may institute an action in any court of

this state or of the United States or any of the several states against any person acting with knowledge or any person to whom notice of a lien for forfeiture of property has been provided in accordance with subsection (j) of this Code section; to whom notice of seizure has been provided in accordance with subsection (i) of this Code section; or to whom notice of a civil proceeding alleging conduct giving rise to forfeiture under this Code section has been provided, if property subject to forfeiture is conveyed, alienated, disposed of, or otherwise rendered unavailable for forfeiture after the filing of a forfeiture lien notice or notice of seizure or after the filing and notice of a civil proceeding alleging conduct giving rise to forfeiture under this Code section, as the case may be. The state may recover judgment in an amount equal to the value of the lien but not to exceed the fair market value of the property or, if there is no lien, in an amount not to exceed the fair market value of the property, together with reasonable investigative expenses and attorneys' fees. If a civil proceeding is pending, the action must be heard by the court in which the civil proceeding is pending.

(3) A district attorney may file and prosecute in any of the courts of this state or of the United States or of any of the several states such civil actions as may be necessary to enforce any judgment rendered pursuant to this Code section.

(4) No person claiming an interest in property subject to forfeiture under this article may commence or maintain any action against the state concerning the validity of the alleged interest other than as provided in this Code section. Except as specifically authorized by this Code section, no person claiming an interest in such property may file any counterclaim or cross-claim to any action brought pursuant to this Code section.

(5) A civil action under this article must be commenced within five years after the last conduct giving rise to forfeiture or to the claim for relief became known or should have become known, excluding any time during which either the property or defendant is out of the state or in confinement or during which criminal proceedings relating to the same conduct are in progress.

(y) Controlled substances included in Schedule I which are contraband and any controlled substance whose owners are unknown are summarily forfeited to the state. The court may include in any judgment of conviction under this article an order forfeiting any controlled substance involved in the offense to the extent of the defendant's interest.

(z) This Code section must be liberally construed to effectuate its remedial purposes. (Code 1933, § 79A-828, enacted by Ga. L. 1974, p.

221, § 1; Ga. L. 1975, p. 919, §§ 1, 2; Ga. L. 1979, p. 879, §§ 1-3; Ga. L. 1981, p. 180, § 3; Ga. L. 1982, p. 3, § 16; Ga. L. 1982, p. 2273, § 1; Ga. L. 1982, p. 2325, § 2; Ga. L. 1983, p. 469, § 1; Ga. L. 1986, p. 451, § 1; Ga. L. 1988, p. 958, § 1; Ga. L. 1991, p. 886, § 1; Ga. L. 1992, p. 6, § 16; Ga. L. 1993, p. 1434, § 1; Ga. L. 2000, p. 1225, § 5; Ga. L. 2000, p. 1589, § 3; Ga. L. 2001, p. 362, § 30; Ga. L. 2002, p. 1039, §§ 1A-1C; Ga. L. 2002, p. 1286, § 1; Ga. L. 2003, p. 191, § 7; Ga. L. 2004, p. 488, § 3.)

Cross references. — Forfeiture of pimping proceeds, § 16-6-13.3. Land bank authority established, § 48-4-61.

Editor's notes. — Ga. L. 1991, p. 886, § 4, not codified by the General Assembly, provides: "(a) The repeal, or repeal and reenactment, of the provisions of Code Section 16-13-49 by this Act shall not abate any cause of action which arose at any previous time under the provisions of said Code section prior to the effective date of this Act. Furthermore, no action for forfeiture shall be abated as a result of the provisions of this Act, and any and every such action or cause of action shall continue, subject only to the applicable statute of limitations.

"(b) No property shall be subject to forfeiture pursuant to this Act where the act or omission which makes such property subject to forfeiture occurred prior to the effective date of this Act unless such property was subject to forfeiture under the laws of this state at the time such act or omission occurred."

Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

Ga. L. 2002, p. 1039, § 1C, not codified by the General Assembly, which purported to repeal certain provisions making changes to this Code section which provi-

sions were not enacted until later, irreconcilably conflicted with and was treated as superseded by Ga. L. 2002, p. 1286, § 1. See *County of Butts v. Strahan*, 151 Ga. 417 (1921).

Law reviews. — For annual survey on criminal law and procedure, see 42 *Mercer L. Rev.* 141 (1990). For article, "Criminal Forfeiture: An Appropriate Solution to the Civil Forfeiture Debate," see 10 *Georgia St. U.L. Rev.* 241 (1994). For article, "The Fourth Amendment and Computers: Is a Computer Just Another Container or Are New Rules Required to Reflect New Technologies?," see 14 (No. 5) *Ga. St. B.J.* 15 (2009).

For note on 1991 amendment of this Code section, see 8 *Georgia St. U.L. Rev.* 28 (1992). For note, "Crime and Offense: Controlled Substances: Provide for the Distribution of Forfeited Real Property; Authorize the Acquisition of Forfeited Real Property by Land Bank Authorities," see 19 *Georgia St. U.L. Rev.* 92 (2002). For note, "Crime and Offense: Relating to Forfeiture of Certain Contraband Property; Change Provisions Relating to Exemptions; Change Certain Provisions Relating to Forfeiture of Certain Contraband Property Relative to Controlled Substances; To Provide for Specific Repeal of Certain Related Provisions," see 19 *Georgia St. U.L. Rev.* 115 (2002). For note on the 2003 amendment to this Code section, see 20 *Georgia St. U.L. Rev.* 105 (2003).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

CONSTITUTIONALITY

PROCEDURE

SEIZURE

General Consideration

Editor's notes. — Some of the following annotations were decided prior to the 1991 amendment of this Code section.

Purpose of O.C.G.A. § 16-13-49 is: (1) the prompt disposition of property subject to forfeiture under the statute; and (2) the protection of property interests of innocent owners as defined by the statute. *Yoder v. State*, 211 Ga. App. 226, 438 S.E.2d 226 (1993).

Time requirement is a requirement for the benefit and protection of property owners. *Turner v. State*, 234 Ga. App. 878, 508 S.E.2d 223 (1998).

Purpose of the mandatory time requirement is to ensure a speedy resolution of contested forfeiture cases in the courts as well as a speedy resolution of property rights. *Turner v. State*, 234 Ga. App. 878, 508 S.E.2d 223 (1998).

O.C.G.A. § 16-13-49 is to be construed as directory rather than mandatory. *Lang v. State*, 168 Ga. App. 693, 310 S.E.2d 276 (1983); *Hill v. State*, 178 Ga. App. 563, 343 S.E.2d 776 (1986).

O.C.G.A. § 16-13-49 is directory, and substantial compliance is sufficient. *State v. Jackson*, 197 Ga. App. 619, 399 S.E.2d 88 (1990).

Strict construction. — Because it is a special statutory proceeding, the forfeiture statute is strictly construed. *State v. Henderson*, 263 Ga. 508, 436 S.E.2d 209 (1993).

Liberal construction. — O.C.G.A. § 16-13-49 is to be liberally construed to effectuate its remedial purposes. *GMAC v. State of Ga.*, 268 Ga. App. 473, 602 S.E.2d 235 (2004).

Construction of O.C.G.A. § 16-13-49(i) and (n). — Construing O.C.G.A. § 16-13-49(i) and (n) in pari materia, the subsections are susceptible of but one reasonable construction; namely, that the district attorney shall give notice of the seizure; that the district attorney may serve the notice upon the owner by certified mail; and that, if the owner of the property desires to file a claim, the owner must do so within 30 days of the date of the second publication of the notice; otherwise, the property is forfeited. In any event, the 30-day period in which to file a claim plainly begins to run from the date

of the second publication. *Weaver v. State*, 299 Ga. App. 718, 683 S.E.2d 361 (2009), cert. denied, No. S10C0024, 2010 Ga. LEXIS 128 (Ga. 2010).

Venue. — In a forfeiture proceeding, testimony that a seized vehicle was in the custody of the Lowndes County Sheriff's Department in Lowndes County, Georgia, was sufficient to prove venue because, under O.C.G.A. § 16-13-49(c)(2), venue was proper in any county where the forfeited property was located or would be during the pendency of the action. *Turner v. State of Ga.*, 265 Ga. App. 40, 592 S.E.2d 864 (2004).

Complaint sufficient. — When the state, by amendment, included a verification, stated that the property was seized during the execution of a search warrant on a residence in a particular town, identified the police force acting as custodian of the items, stated the property was in the jurisdiction of a particular court within the county, and stated that the defendant drove the truck to the place of seizure and had filed a claim to it, thus inferentially identifying the defendant as the owner of the property, the complaint was properly held not to be deficient. *Eaves v. State*, 236 Ga. App. 279, 511 S.E.2d 621 (1999).

Applicability of default judgment statute. — O.C.G.A. § 16-13-49 provides a special statutory proceeding to which default is not applicable; therefore, the default judgment statute (O.C.G.A. § 9-11-55) does not apply to the forfeiture proceedings under O.C.G.A. § 16-13-49. *Hubbard v. State*, 201 Ga. App. 213, 411 S.E.2d 44, cert. denied, 201 Ga. App. 904, 411 S.E.2d 44 (1991); *Turner v. State*, 213 Ga. App. 309, 444 S.E.2d 372 (1994).

Provision of O.C.G.A. § 9-11-55, relating to default judgments, are not applicable to the special statutory procedure created by O.C.G.A. § 16-13-49, and thus did not apply to the forfeiture complaints against money and jewelry found in the plaintiff's possession. *Ford v. State*, 235 Ga. App. 755, 509 S.E.2d 734 (1998).

Government's interest vests when property used in criminal act. — When property is subject to forfeiture for violation of the law, title vests absolutely in the government on the date of the

General Consideration (Cont'd)

illegal act. *English v. State*, 202 Ga. App. 751, 415 S.E.2d 659 (1992).

Payment of fine from money in custodia legis not a forfeiture. — Trial court possesses the inherent power to enter an order directing that money in custodia legis be used to pay a defendant's fine, and such order did not result in a forfeiture. *Ward v. State*, 195 Ga. App. 166, 393 S.E.2d 21 (1990).

In rem proceeding. — Condemnation forfeiture is an in rem proceeding rather than an in personam action, and it is jurisdiction over the property rather than the owner that is essential. *Lang v. State*, 168 Ga. App. 693, 310 S.E.2d 276 (1983).

Forfeiture is an in rem proceeding. *Hill v. State*, 178 Ga. App. 563, 343 S.E.2d 776 (1986).

Actual sale is not necessary to support forfeiture under O.C.G.A. § 16-13-49(e), overruling *Carr v. State*, 212 Ga. App. 36, 441 S.E. 2d 85 (1994). The state does need, however, to show a strong nexus between the property and the alleged violation, such as where the property in question is being used to grow a large amount of marijuana for sale, even though no actual sale takes place. *Rabern v. State*, 221 Ga. App. 874, 473 S.E.2d 547 (1996), remanded, 231 Ga. App. 84, 497 S.E.2d 631 (1998).

Vehicle is subject to forfeiture: (1) when it is used by its owner to facilitate the sale of controlled substances; or (2) when used by an operator to facilitate the sale of controlled substances with the owner's knowledge or consent. *State v. Croom*, 168 Ga. App. 145, 308 S.E.2d 427 (1983).

Defendant's vehicle was subject to forfeiture when there was evidence to support a finding that cocaine found on the ground next to the vehicle came from the truck and that the vehicle was contraband. *Hinton v. State*, 224 Ga. App. 49, 479 S.E.2d 424 (1996).

Evidence that the defendant drove the vehicle to an apartment to participate in prohibited drug activity and that the defendant intended to leave the apartment in the same manner supported a determination that the vehicle was used or was

intended to be used, directly or indirectly, to facilitate a violation of the Controlled Substances Act, O.C.G.A. § 16-13-20 et seq. *Bettis v. State*, 228 Ga. App. 120, 491 S.E.2d 155 (1997).

Trial court did not err in ordering forfeiture of three vehicles based on evidence that over an approximate one-week period of time, the defendant was involved in three controlled buys of suspected cocaine from the vehicles. *Jones v. State*, 249 Ga. App. 64, 547 S.E.2d 725 (2001).

There was evidence to support the trial court's finding that property found in a vehicle was used to facilitate a drug transaction involving more than four ounces of marijuana and/or found in close proximity to more than four ounces of marijuana, thereby subjecting the property to forfeiture to the State of Georgia pursuant to O.C.G.A. § 16-13-49 because the state produced evidence that 17.6 ounces of marijuana and a blunt were found in the vehicle. *Sumner v. State*, 306 Ga. App. 140, 701 S.E.2d 585 (2010).

Defendant's vehicle was not subject to forfeiture where it was neither used nor intended for use to transport, hold or conceal the contraband but was used only to transport defendant to the site where the cocaine was located and the sale eventually took place. *State v. Hamm*, 193 Ga. App. 184, 387 S.E.2d 344 (1989).

Personal property within dwelling. — Evidence sufficient for conviction of burglary where defendant attempted to remove items defendant claimed were defendant's personal property from a house subject to forfeiture after the forfeiture order had lapsed. *Underwood v. State*, 221 Ga. App. 93, 470 S.E.2d 699 (1996).

Proximity of money to drugs establishes prima facie case. — Showing by the state that money is in close proximity to drugs is sufficient to establish a prima facie case in an action for condemnation of the money. *Moore v. State*, 209 Ga. App. 89, 432 S.E.2d 597 (1993).

Plaintiff's burden of proof in forfeiture action based upon controlled substances crime. — Plaintiff in a forfeiture action has the initial burden of presenting a prima facie case that the defendant's property is subject to forfeiture. In order to meet this burden, the

plaintiff must show by a preponderance of the evidence it presents that the essential elements of a controlled substances crime are present. The plaintiff must also show by a preponderance of the evidence it presents that the defendant's property was substantially connected to the criminal activity. *Georgia v. Six Hundred Forty Thousand, Seven Hundred Sixty-Eight Dollars in United States Currency*, 712 F. Supp. 180 (N.D. Ga. 1988).

State's burden of proof. — Forfeiture action under O.C.G.A. § 16-13-49 is a civil proceeding, and the state, as plaintiff, is required to prove its case by a preponderance of the evidence rather than by the higher burden of proof applicable to criminal cases; the state met its burden of proof after the trial court inferred the following from defendant's invocation of defendant's right against self-incrimination: (1) defendant used defendant's vehicle to transport more than four ounces of marijuana and cocaine; (2) the vehicle, the cash, and the stereo system were in close proximity to more than four ounces of marijuana and cocaine; and (3) defendant either consented to the conduct of possession of marijuana and cocaine with intent to distribute, or defendant knew or reasonably should have known of said conduct. *Sanders v. State*, 259 Ga. App. 422, 577 S.E.2d 94 (2003).

Shifting burden of proof. — Once the plaintiff has met its initial burden of presenting a prima facie case, the burden shifts to the intervenor to show that the seized property is not subject to forfeiture. *Georgia v. Six Hundred Forty Thousand, Seven Hundred Sixty-Eight Dollars in United States Currency*, 712 F. Supp. 180 (N.D. Ga. 1988).

Preserving interests of innocent owners. — Term "owner" as used in O.C.G.A. § 16-13-49(a)(7) applies to owners to the extent of their interest in property subject to forfeiture. Thus, the state may condemn the property interests of wrongdoers, and those otherwise failing to qualify as innocent owners under the statute, while at the same time preserving the interests of innocent owners. *State v. Jackson*, 197 Ga. App. 619, 399 S.E.2d 88 (1990).

Trial court's order of forfeiture entered

against a wife was reversed, given evidence that the wife sufficiently showed a status as an innocent owner, lacking the knowledge that the husband was selling drugs from the vehicle seized and the wife's knowledge of the husband's prior criminal activity failed to serve as notice of future criminal activity; furthermore, to hold that the wife acquired knowledge that the husband would use the vehicle in a manner giving rise to its forfeiture would misconstrue the statute and undermine the rights of innocent spouses. *Love v. State of Ga.*, 281 Ga. App. 664, 637 S.E.2d 81 (2006).

Proof required of alleged innocent owner. — Co-owner who asserts the innocent owner exception under O.C.G.A. § 16-13-49 has a two-fold burden. First, in order to establish standing to contest the forfeiture, the co-owner has the burden of proving the nature and extent of the co-owner's interest in the property. Second, the co-owner must prove by a preponderance of the evidence that the co-owner is entitled to the exception as defined by the statute. *State v. Jackson*, 197 Ga. App. 619, 399 S.E.2d 88 (1990).

Claimant who appeared and demanded possession as owner of an automobile which was the subject of a civil forfeiture action established a sufficient ownership interest, as against the state, by proof of claimant's payment of valuable consideration and receipt of the certificate of title from the transferor, even though the claimant failed to register the vehicle. *State v. Banks*, 215 Ga. App. 828, 452 S.E.2d 533 (1994).

In a forfeiture action, the court did not cast the burden on the state of establishing that the vehicle owner had knowledge of the drug sale, whereas the burden was on the owner to establish that the owner did not have such knowledge, where the court found in favor of the owner because it found credible the owner's testimony that the owner did not have such knowledge. *State v. Ledford*, 217 Ga. App. 272, 456 S.E.2d 757 (1995).

When there was evidence to support the conclusion that the owner of the property was not a bona fide purchaser for value, the property was subject to forfeiture. *Maynard v. State*, 217 Ga. App. 344, 457

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S.E.2d 253 (1995); *Salem v. State*, 232 Ga. App. 886, 503 S.E.2d 62 (1998), cert. denied, 528 U.S. 965, 120 S. Ct. 400, 145 L. Ed. 2d 312 (1999).

When the evidence was that a vehicle which was the subject of forfeiture actually belonged to the defendant, and that the supposed owner was a strawman whom the defendant sought to use in order to avoid the loss of defendant's car as a result of the car's use in the transportation of drugs, it was sufficient to support a finding that the car belonged to the defendant. *Mitchell v. State*, 236 Ga. App. 335, 511 S.E.2d 880 (1999).

Because: (1) the state presented sufficient evidence that both parents were aware of their son's prior arrest for possession of marijuana with the intent to distribute while using the father's truck and the mother's cell phone, and knew that defendant had in fact used the truck to commit that crime; and (2) the father had been previously warned that his truck could be subject to forfeiture if his son was again caught using it while engaging in drug sales, upon the occurrence of the same, the parents failed to present clear and convincing evidence of their innocent owner status to avoid forfeiture of both their truck and the cell phone. *Little v. State of Ga.*, 279 Ga. App. 329, 630 S.E.2d 903 (2006).

Test, which allowed even an interest holder that had knowledge of the illicit use of its property to take advantage of the "innocent" interest holder defense by showing that it took reasonable measures to prevent such use, was a proper interpretation of O.C.G.A. § 16-13-49(e). *GMAC v. State of Ga.*, 268 Ga. App. 473, 602 S.E.2d 235 (2004).

To have standing to contest a forfeiture, a party must have at least some property interest in the subject matter of the condemnation proceeding. That interest may be one of ownership, lease holder, or secured party, but there must be some substantial interest greater than an asserted "superior right of possession" resulting from the mere fact that the property was seized from one's residence. *Chester v. State*, 168 Ga. App. 618, 309 S.E.2d 897 (1983).

Claimant did not have standing to contest forfeiture where claimant failed to demonstrate an ownership interest in the property as recognized by O.C.G.A. § 16-13-49. *Lockett v. State*, 218 Ga. App. 289, 460 S.E.2d 857 (1995).

Because the claimant had a possessory interest in the claimant's child's Social Security check, as bailee of the funds, claimant had standing to contest the forfeiture of the property. *Jackson v. State*, 231 Ga. App. 320, 498 S.E.2d 159 (1998).

When the trial court found that the appellant did not own a sum of cash ordered to be forfeited and appellant did not challenge that finding, the appellant had no standing to challenge the trial court's conclusion that the cash was subject to forfeiture. *Holmes v. State*, 233 Ga. App. 872, 506 S.E.2d 157 (1998).

When a wife gave cash to her husband to pay an attorney, but the husband used the money to bribe a police officer, the wife relinquished control of the cash and lacked standing to challenge the forfeiture of the money. *Belvin v. State*, 258 Ga. App. 790, 575 S.E.2d 707 (2002).

Party must have at least some property interest in the subject matter of the condemnation proceeding; a person who has no interest in property cannot complain of the property's forfeiture because as a stranger to the property, that person is a mere member of the public volunteering to challenge the entitlement of the state to the property. *Shepard v. State of Ga.*, 267 Ga. App. 604, 600 S.E.2d 691 (2004).

No public record allowed a criminal defendant's parent to perfect an implied trust (based on the parent's allegation that the parent paid for cars but titled them in the son's name for insurance purposes) against a bona fide purchaser for value; so, in a O.C.G.A. § 16-13-49 forfeiture proceeding of two cars, the parent was not the statutory "owner" or "interest holder" as those terms were defined in O.C.G.A. §§ 11-9-102 and 16-13-49 and the parent thus lacked standing to contest the forfeiture. *McFarley v. State of Ga.*, 268 Ga. App. 621, 602 S.E.2d 341 (2004).

Trial court erred in finding that a defendant and the mother had standing as claimants to assert ownership in currency that was the subject of a civil forfeiture

proceeding by the state, as it was found in close proximity to seized marijuana and other property subject to forfeiture during execution of a search warrant in defendant's apartment, as there was no showing by defendant and the mother that the funds which the mother allegedly had previously given to defendant to use on college expenses of defendant's brother were the same funds that were the seized currency. *State of Ga. v. Richardson*, 276 Ga. App. 784, 625 S.E.2d 52 (2005).

Innocent ownership not proven. — In a civil forfeiture action under O.C.G.A. § 16-13-49, a wife did not show that she was an innocent owner of money and a pickup truck. There was no evidence either that the money was given solely to the husband or that the money belonged jointly to the spouses, and although the truck was in the wife's name, there was evidence that the truck was held jointly in that the husband drove the truck. *Webb v. State*, 300 Ga. App. 29, 684 S.E.2d 115 (2009).

While the defendant's parent produced evidence that the parent was the title owner of the vehicle that was forfeited to the state and that the parent had allowed the defendant to use the vehicle for the weekend, the evidence supported the trial court's findings that the parent held the vehicle jointly, in common, or in community with the defendant based on their shared ownership and use of the vehicle; the defendant installed a "boom box" in the trunk of the vehicle, which occupied the entire trunk, the defendant installed custom tires and rims on the vehicle, which the parent admitted belonged to the defendant, the defendant painted the vehicle a few days before the defendant's arrest, and the defendant's personal effects were in the vehicle. *Sumner v. State*, 306 Ga. App. 140, 701 S.E.2d 585 (2010).

Bailee of seized property has a possessory interest in the property and has standing to contest the forfeiture thereof. *Lawrence v. State*, 231 Ga. App. 739, 501 S.E.2d 254 (1998).

Question for jury. — Although agent did not observe manner in which defendant arrived with cocaine, either prior to meeting inside restaurant or from inside motor home, it would be reasonable to

infer, since defendant owned the motor home, that defendant drove it into the parking lot while the cocaine was in defendant's physical possession; and resolution of use or intended use of motor home for transportation or facilitation of transportation of the cocaine was duty of jury. *State v. Belcher*, 165 Ga. App. 139, 299 S.E.2d 57 (1983).

State in forfeiture proceeding does not occupy status of creditor or lienholder so that security interest of intervenor, where not properly recorded, is subordinated to it. *Hallman v. State*, 141 Ga. App. 527, 233 S.E.2d 839 (1977).

State in forfeiture proceeding is not in position of creditor or lienholder. *State v. Sewell*, 155 Ga. App. 734, 272 S.E.2d 514 (1980).

State's interest in forfeiture proceeding is only to prevent guilty party from further misusing property. *State v. Sewell*, 155 Ga. App. 734, 272 S.E.2d 514 (1980).

Funds not distributed by courts but by local agencies. — Trial judge properly denied a forfeiture claimant's motion to recuse the claimant for bias based on the claimant's interest in funding for the drug court because claimant failed to establish a connection between the monies obtained through forfeiture and the funding of the drug court. Under O.C.G.A. § 16-13-49(u)(4)(D), funds obtained through forfeiture were not distributed by the courts but by local agencies. *Grant v. State*, 304 Ga. App. 133, 695 S.E.2d 420 (2010).

Collateral attack of legality of underlying search. — Collateral attack on the legality of the underlying search may be made in the context of forfeiture proceedings pursuant to O.C.G.A. § 16-13-49 when the validity of the search has not been previously adjudicated in a criminal action. *Pitts v. State*, 207 Ga. App. 606, 428 S.E.2d 650 (1993).

Postjudgment attack on forfeiture. — Defendant's motion in a criminal proceeding for return of money that was forfeited in civil proceeding was properly denied since the proper method of making a postjudgment attack on a forfeiture is through O.C.G.A. § 9-11-60. *Youree v. State*, 220 Ga. App. 453, 469 S.E.2d 208 (1996).

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Security interest not forfeited where secured party unaware of illegal use of vehicle. — Where there was no evidence that secured party was aware that car subject to security interest was used for illegal transport of marijuana, security interest was not forfeited. *State v. Sewell*, 155 Ga. App. 734, 272 S.E.2d 514 (1980).

Failure to file security agreement concerning airplane with FAA. — Fact that security agreement concerning airplane had not been registered or recorded with the FAA, an agency of the department of transportation, did not bar the secured party from protecting its security interest in a condemnation proceeding pursuant to O.C.G.A. § 16-13-49. *F & M Bank v. State*, 167 Ga. App. 77, 306 S.E.2d 11 (1983).

Participation in preliminary hearing constitutes notice. — Assistant district attorney's participation in the preliminary hearing at which testimony concerning the seizure was elicited, constituted notice to the district attorney. *State v. Luke*, 183 Ga. App. 182, 358 S.E.2d 272 (1987).

Notice held sufficient for out-of-state residents. — Publication of forfeiture proceedings for two weeks in a newspaper with local circulation in Lowndes County, as provided for in O.C.G.A. § 16-13-49(e), was not insufficient notice to the defendants as out-of-state residents so as to be violative of the due process provisions of the state and federal constitutions. Not only did the state publish notice of the proceedings, but it also attempted, unsuccessfully, personal service, at addresses which were supplied by the defendants themselves to drug agents at the time of arrest. *Pack v. State*, 187 Ga. App. 210, 369 S.E.2d 530 (1988).

No standing for general unsecured creditor. — General unsecured creditor does not have a legally cognizable interest sufficient to grant the creditor standing to challenge a forfeiture action against seized currency. *Crenshaw v. State*, 206 Ga. App. 271, 425 S.E.2d 660 (1992).

No retroactive application of O.C.G.A. § 16-13-49(o)(3). — See *Jones*

v. State, 210 Ga. App. 140, 435 S.E.2d 507 (1993).

Forfeiture inappropriate. — Forfeiture provisions of O.C.G.A. § 16-13-49 do not apply to transactions involving counterfeit controlled substances. *State v. White*, 216 Ga. App. 183, 454 S.E.2d 542 (1995).

Forfeiture of 5.1 acres of land, including a house, based on the recovery of a few immature marijuana plants growing on a small portion of the property was excessive under U.S. Const., Amend 8, and mitigation of the forfeiture was not practicable. *State v. Evans*, 225 Ga. App. 402, 484 S.E.2d 70 (1997).

Forfeiture appropriate. — When it was probable defendant would have left the site with the marijuana in the pickup had defendant not been arrested, even though the arrest prevented the pickup from actually being used to transport the contraband, the court did not err in ordering the truck's forfeiture. *Lanier v. State*, 212 Ga. App. 51, 441 S.E.2d 87 (1994).

Evidence of defendant's possession of methamphetamine was sufficient to support the forfeiture of defendant's truck. *Gearin v. State*, 218 Ga. App. 390, 461 S.E.2d 562 (1995).

Evidence that marijuana was to be transported in defendant's vehicle and that money found in defendant's pocket was to be used to pay defendant's drug courier was sufficient to show that the items were contraband subject to forfeiture. *Michael v. State*, 226 Ga. App. 288, 486 S.E.2d 406 (1997).

A CD and checking account found in close proximity to marijuana in a private residence were subject to forfeiture after the owner could not prove acquisition thereof as a bona fide purchaser. *Salem v. State*, 232 Ga. App. 886, 503 S.E.2d 62 (1998), cert. denied, 528 U.S. 965, 120 S. Ct. 400, 145 L. Ed. 2d 312 (1999).

State showed a strong nexus between currency and the claimant's activity of selling marijuana sufficient to support forfeiture of the currency since the currency was seized at the time the defendant was arrested for possession of marijuana, and although no actual drug transaction was observed, the arresting officers had received a tip that the defendant was selling

drugs, the defendant fled with a paper bag in defendant's hands when the officers stopped the defendant, the officers later found the bag containing currency some ten feet away from where the officers arrested the defendant, and 1.1 ounces of bagged marijuana were found in the defendant's car. *Morris v. State*, 234 Ga. App. 683, 507 S.E.2d 532 (1998).

Trial court's judgment of condemnation was supported by a preponderance of the evidence including: authentication by a forensic chemist that a sample submitted was cocaine, and the laboratory report showed 67.2 grams of the cocaine to have 78 percent purity; testimony by an officer that the cocaine was field tested and by the drug's color, the officer knew that the drugs were going to be a good purity; evidence showed that defendant was able to supply a kilo of cocaine on very short notice, leading to an inference that defendant was regularly engaged in the drug trade; defendant's explanations for the presence of the large amount of cash in defendant's apartment were not reasonable given the earnings defendant reported to the Internal Revenue Service; defendant's explanation for having a bulletproof vest and the gun was not reasonable, and defendant had no explanation for the presence of cocaine in a vehicle owned by the defendant. *Davis v. State*, 256 Ga. App. 299, 568 S.E.2d 161 (2002).

In a civil in rem forfeiture proceeding, because the trial court agreed that due process required a judicial finding of some degree of criminal responsibility on the part of the owner of contraband before the government could constitutionally take title to the property, the trial court properly found as a factual matter that the owner at issue possessed the requisite degree of criminal responsibility to justify a forfeiture, and could not, therefore, demonstrate reversible error on appeal. *Walden v. State of Ga.*, 283 Ga. 148, 656 S.E.2d 801 (2008).

Trial court's order of forfeiture was upheld on appeal and thus was not subject to dismissal as: (1) the trial court was presented with testimony from witnesses other than the affiant, as well as sufficient other evidence, to support the order; (2) the alleged property owner waived any

defense of insufficient service; and (3) an alternative code section did not afford the owner relief. *McDowell v. State of Ga.*, 290 Ga. App. 538, 660 S.E.2d 24 (2008).

In a civil forfeiture proceeding, the trial court properly entered an order of forfeiture and disposition of seized property as the challenging claimant failed to file a claim to the property within 30 days from the second publication notice. Therefore, the claim was untimely. *Weaver v. State*, 299 Ga. App. 718, 683 S.E.2d 361 (2009), cert. denied, No. S10C0024, 2010 Ga. LEXIS 128 (Ga. 2010).

When a corporation made no effort to determine whether a truck, on which the corporation was a lienholder, was being used to transport illegal drugs, the trial court properly forfeited the corporation's interest in the truck. *GMAC v. State of Ga.*, 268 Ga. App. 473, 602 S.E.2d 235 (2004).

Trial court's innocent owner finding upheld. — Because the plain language of O.C.G.A. § 16-13-49 supported the trial court's conclusion that the owner was permitted under § 16-13-49(o)(3) to file an answer in the state's in rem proceeding seeking forfeiture of a truck the state seized, and as to which the owner claimed "innocent owner" status, and the owner filed a timely claim, the appeal court rejected the state's contrary contention. *State of Ga. v. Howell*, 288 Ga. App. 176, 653 S.E.2d 330 (2007), cert. denied, 2008 Ga. LEXIS 224 (Ga. 2008).

Double jeopardy. — Forfeiture proceeding under O.C.G.A. § 16-13-49 is legitimately a civil sanction and does not constitute punishment for purposes of double jeopardy. *Murphy v. State*, 267 Ga. 120, 475 S.E.2d 907 (1996); *Lundy v. State*, 226 Ga. App. 197, 482 S.E.2d 516 (1997).

Constructive notice permissible. — Property owner was not entitled to relief under Fed. R. Civ. P. 60(b)(4) on the ground that the court's judgment was inconsistent with due process of law because: (1) the court did not improperly invoke the fugitive disentitlement doctrine; (2) Supp. R. Adm. or Mar. Cl. & Asset Forfeiture Actions G(4)(a)(iii)-(iv) required publication of the forfeiture proceeding once a week for three consecutive

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weeks in a newspaper generally circulated in the district where the action was filed, and those procedures were fully complied with as written notice was served upon petitioner's property by the United States Marshals and was printed for three weeks in the Atlanta Journal Constitution, a local newspaper in general circulation in the district; and (3) the notice was sufficient under CAFRA, 18 U.S.C. § 985 since a copy of the complaint was posted on the defendant's property by the United States Marshals and because at the time of the original forfeiture action, there were serious criminal charges pending against the property owner, and law enforcement officers were actively attempting to locate the defendant, the government therefore exercised due diligence attempting to locate petitioner, and thus, constructive notice under Georgia law, O.C.G.A. § 16-13-49(i)(2), was permissible. *United States v. 5054 Stoney Point Lake*, 731 F. Supp. 2d 1345 (N.D. Ga. Aug. 12, 2010).

Cited in *State v. Norton*, 142 Ga. App. 772, 237 S.E.2d 11 (1977); *First Bank & Trust v. State*, 150 Ga. App. 436, 258 S.E.2d 59 (1979); *State v. Johnson*, 153 Ga. App. 816, 266 S.E.2d 529 (1980); *Green v. State*, 155 Ga. App. 795, 272 S.E.2d 761 (1980); *Duckett v. State*, 158 Ga. App. 285, 279 S.E.2d 734 (1981); *Sacchinelli v. State*, 161 Ga. App. 763, 288 S.E.2d 894 (1982); *Bell v. State*, 162 Ga. App. 79, 290 S.E.2d 187 (1982); *State v. 1977 Pontiac*, 163 Ga. App. 456, 294 S.E.2d 660 (1982); *Garvey v. State*, 176 Ga. App. 268, 335 S.E.2d 640 (1985); *Cooper v. State*, 186 Ga. App. 154, 366 S.E.2d 815 (1988); *Jewell v. State*, 200 Ga. App. 203, 407 S.E.2d 763 (1991); *State v. Walls*, 202 Ga. App. 899, 415 S.E.2d 921 (1992); *Stalvey v. State*, 210 Ga. App. 544, 436 S.E.2d 579 (1993); *Manley v. State*, 217 Ga. App. 556, 458 S.E.2d 179 (1995); *Hunstein v. McDade*, 267 Ga. 515, 480 S.E.2d 192 (1997); *Brown v. State*, 225 Ga. App. 201, 483 S.E.2d 641 (1997); *Lyon v. State*, 230 Ga. App. 264, 495 S.E.2d 899 (1998); *Daugherty v. Jarrett*, 239 Ga. App. 466, 521 S.E.2d 406 (1999); *James v. State*, 240 Ga. App. 288, 523 S.E.2d 354 (1999); *Giraldo v. State*, 249 Ga. App. 178,

547 S.E.2d 395 (2001); *Gary v. State*, 249 Ga. App. 879, 549 S.E.2d 826 (2001); *Green v. State*, 250 Ga. App. 440, 550 S.E.2d 736 (2001); *Hooper v. State*, 252 Ga. App. 574, 555 S.E.2d 842 (2001); *Gober v. State*, 275 Ga. 356, 566 S.E.2d 317 (2002).

Constitutionality

O.C.G.A. § 16-13-49 does not violate Ga. Const. 1983, Art. III, Sec. V, Para. III, which forbids treatment of more than one subject matter in a single statute. *Lang v. State*, 168 Ga. App. 693, 310 S.E.2d 276 (1983).

O.C.G.A. § 16-13-49 affords adequate notice and hearing so as to comport with due process requirements of federal Constitution and the Georgia Constitution. *Tant v. State*, 247 Ga. 264, 275 S.E.2d 312 (1981).

Contrary to a firearms owner's assertion, the publication method selected by the Georgia Legislature did not need to ensure actual notice in order for O.C.G.A. § 16-13-49(n) to comport with due process, and O.C.G.A. § 16-13-49(n) was not required to provide for notice to be printed in the county's legal organ in order to satisfy due process; publication in a newspaper of general circulation was sufficient to satisfy the requirements of due process. *Brewer v. State of Ga.*, 281 Ga. 283, 637 S.E.2d 677 (2006).

O.C.G.A. § 16-13-49(c) does not violate the equal protection and due process clauses of the United States Constitution. *Porter v. State*, 196 Ga. App. 31, 395 S.E.2d 360 (1990).

Constitutional prohibition against excessive fines applies to civil in rem forfeitures. *Thorp v. State*, 264 Ga. 712, 450 S.E.2d 416 (1994); *Shook v. State*, 221 Ga. App. 151, 470 S.E.2d 535 (1996).

Factors for evaluating whether a civil in rem forfeiture is excessive are: (1) consideration of the inherent gravity of the offense compared with the harshness of the penalty; (2) whether the property was close enough to the offense to render it "guilty"; and (3) whether the criminal activity involving the property was extensive in terms of time and/or spatial use. *Thorp v. State*, 264 Ga. 712, 450 S.E.2d 416 (1994).

Finding that forfeited currency was used in the purchase of cocaine was supported by the evidence; thus, the forfeiture did not violate the excessive fines clause. *Lundy v. State*, 226 Ga. App. 197, 482 S.E.2d 516 (1997).

Direction of the Court of Appeals upon remand of a forfeiture proceeding requiring the trial court to hold a hearing to determine whether the forfeiture violated the constitutional prohibition against excessive fines was mandatory, and the trial court had no discretion to refuse to comply with the direction. *Rabern v. State*, 231 Ga. App. 84, 497 S.E.2d 631 (1998).

Finding that a portion of real property was used to facilitate drug activities did not make the entire tract of land contraband and, thus, forfeiture of a residence and the 5.2 acres of land upon which the residence stood was excessive. *Rabern v. State*, 242 Ga. App. 804, 531 S.E.2d 373 (2000).

O.C.G.A. § 16-13-49 does not violate excessive fines provision. — Condemnation to the state of 5.1 acres of land on which marijuana plants totaling 8.8 ounces were found growing did not violate state or federal constitutional provisions prohibiting excessive fines. *Evans v. State*, 214 Ga. App. 844, 449 S.E.2d 302 (1994).

Based on a property owner's willful blindness to the illegal growing of marijuana on the subject property, and the owner's knowledge of the past use of the property for criminal purposes, the forfeiture did not amount to an unconstitutional excessive fine; moreover, the harshness of the forfeiture was not grossly disproportionate to the gravity of the offense on which it was based or to the owner's own culpability. *Howell v. State of Ga.*, 283 Ga. 24, 656 S.E.2d 511 (2008).

Right against self-incrimination. — Defendant failed to show how requiring the defendant to conform to the pleading requirements of O.C.G.A. § 16-13-49(o)(3) violated the defendant's Fifth Amendment right against self-incrimination. *Jett v. State*, 230 Ga. App. 655, 498 S.E.2d 274 (1998).

Defendant was not forced to be a witness against self in criminal case when the trial court allowed admission of certain answers defendant gave in a petition

filed in a related civil forfeiture proceeding that defendant owned certain property, including illegal drugs seized at defendant's residence, as defendant had the option of seeking a stay of the civil forfeiture proceeding while the criminal case was going on, but chose not to do so. *Clemons v. State*, 257 Ga. App. 96, 574 S.E.2d 535 (2002).

Statute does not violate the confrontation clause. — Trial court did not err in admitting hearsay evidence in a forfeiture hearing, pursuant to O.C.G.A. § 16-13-49(s)(1), where officers who testified therein were not called upon to prove that defendant violated the law but for the limited purpose of explaining the basis for seeking a warrant; therefore, the trial court correctly rejected defendant's challenge that the statute violated defendant's constitutional right to face defendant's accusers. *Banks v. State of Ga.*, 277 Ga. 543, 592 S.E.2d 668 (2004).

Procedural due process does not require a preseizure hearing in cases of contraband condemnation. *State v. Bailey*, 233 Ga. 795, 213 S.E.2d 661 (1975).

Former language "or possessed in violation of § 16-13-32.2" was invalid. *Windfaire, Inc. v. Busbee*, 523 F. Supp. 868 (N.D. Ga. 1981).

Provisions mandating proceedings without jury trial. — O.C.G.A. § 16-13-49(o)(5) and (p)(6), mandating drug forfeiture proceedings "without a jury trial," violate neither the Seventh Amendment to the federal Constitution, whose range is over federal drug forfeiture actions, nor Ga. Const. 1983, Art. I, Sec. I, Para. XI, as the right to jury trial in drug forfeiture proceedings did not exist in 1798. *Swails v. State*, 263 Ga. 276, 431 S.E.2d 101, cert. denied, 510 U.S. 1011, 114 S. Ct. 602, 126 L. Ed. 2d 567 (1993).

No unconstitutional taking resulted from lawful forfeiture. — Because a forfeiture of real property was not made under the power of eminent domain, and the trial court properly ruled that the forfeiture was proper, no takings clause issue was presented which entitled the property owner to just compensation. *Howell v. State of Ga.*, 283 Ga. 24, 656 S.E.2d 511 (2008).

Procedure

Applicability of subsection (e). — O.C.G.A. § 16-13-49(e) had no application where it was the federal government, and not the state, which brought the forfeiture proceeding. *Freeman v. City of Atlanta*, 195 Ga. App. 641, 394 S.E.2d 784 (1990).

Applicability of § 17-5-54. — When the claimant asserted a right to property which was the subject of a forfeiture proceeding under O.C.G.A. § 16-13-49, the state's filing of a dismissal did not terminate the proceeding, and the sheriff was not authorized to apply for an order disposing of the property as "abandoned" pursuant to O.C.G.A. § 17-5-54. *Boone v. Sheriff of Lowndes County*, 232 Ga. App. 601, 502 S.E.2d 535 (1998).

Libel condemnation proceeding is a special statutory proceeding governed by O.C.G.A. § 16-13-49, which must be strictly construed. *Lang v. State*, 168 Ga. App. 693, 310 S.E.2d 276 (1983).

Failure to initiate proceedings. — Claimant's sole remedy for failure by the district attorney to initiate forfeiture action within sixty days of seizure of the property was to request return of the property pending further proceeding under O.C.G.A. § 16-13-49 and, absent such request, any error made by the superior court in determining if or when seizure of the property had occurred prior to the final order in the forfeiture proceeding was harmless. *Turner v. State*, 213 Ga. App. 309, 444 S.E.2d 372 (1994).

Although the state failed to bring proceedings in a timely manner for forfeiture of a car and money seized when drugs were found in the car, the car owner was not entitled to have the forfeiture proceedings dismissed; the property was always subject to further forfeiture proceedings, which took place, and since the car owner failed to show any harm resulting from the state's failure to initiate the proceedings in a timely manner, the order upholding the seizure was affirmed. *Johnson v. State of Ga.*, 266 Ga. App. 171, 596 S.E.2d 693 (2004).

Condemnation proceeding is designed to be expeditious and a party may not belatedly tender an answer to petition under general rules of civil practice. *State v. Britt Caribe, Ltd.*, 154 Ga.

App. 476, 268 S.E.2d 702 (1980).

Proceedings were timely when it was shown that the state commenced the forfeiture proceedings within 60 days of the seizure. *Owens v. State*, 241 Ga. App. 140, 525 S.E.2d 150 (1999).

In a forfeiture action, the trial court did not abuse its discretion in finding that the 60-day time requirement to conduct a hearing under O.C.G.A. § 16-13-49(o)(5) did not commence until the date that the claimant's father was served with the complaint and summons and not the date when the claimant was served; claimant's acknowledgment of service was ineffective to operate as a waiver of service because it was not served upon the prosecutor. *Mitchell v. State*, 255 Ga. App. 507, 566 S.E.2d 24 (2002), cert. denied, 255 Ga. App. 553, 565 S.E.2d 877 (2002).

Trial court did not err in denying an owner's motion to dismiss the state's complaint in rem for forfeiture of property pursuant to O.C.G.A. § 16-13-49 because the state invoked a hearing within 60 days of service of the state's complaint as required by § 16-13-49(o)(5), and the hearing was continued for good cause; the state invoked a hearing within 60 days of service of the state's complaint by forwarding a blank rule nisi to the trial court and asking that the trial court fix a hearing, and the trial court did not, or could not, set a hearing within the 60-day statutory period because of the court's crowded docket, which constituted good cause for a continuance of the requested hearing. *Sims v. State*, 299 Ga. App. 738, 683 S.E.2d 686 (2009).

Proceedings were untimely. — In a civil forfeiture case, the state improperly seized cash from the plaintiff because the requirements of O.C.G.A. § 16-13-49(o)(5) were not met since the hearing on the forfeiture complaint was conducted more than 60 days after the prior continuance, and nothing in the record indicated that the plaintiff consented to re-scheduling the hearing outside the statutory period; the hearing took place 69 days after the last continuance, the plaintiff appeared ready for the hearing on two occasions, and through no fault of the plaintiff's own, the hearing was continued both times. *Williams v. State*, 302 Ga. App. 617, 691 S.E.2d 385 (2010).

Fact that car is subject to forfeiture does not excuse failure to institute forfeiture proceedings. — Mere fact that car used in transporting drugs was subject to forfeiture proceedings under O.C.G.A. § 16-13-49 will not insulate police officers from liability if they detained the car or caused it to be detained without instituting forfeiture proceedings. *Jonas v. City of Atlanta*, 647 F.2d 580 (5th Cir. 1981).

State cannot, through notice to produce, achieve results it unsuccessfully sought under this section. — State may not, by using notice to produce pursuant to O.C.G.A. §§ 24-10-26 and 24-10-29 attempt to secure indirectly the same disposition of property which would have been obtained in accordance with O.C.G.A. § 16-13-49 had its libel for condemnation been successful. *Johnson v. State*, 156 Ga. App. 496, 274 S.E.2d 837 (1980).

Unconstitutional self-incrimination would be result of compliance with such notice. *Johnson v. State*, 156 Ga. App. 496, 274 S.E.2d 837 (1980).

Time specification in summons constituting mere surplusage. — In a case under O.C.G.A. § 16-13-49, the summons issued by the clerk of the trial court and attached to the process directed defendant to answer the complaint "within 30 days after service of this summons upon you, exclusive of the day of service," and defendant's "answer" was timely filed in accordance with the clerk's summons, albeit not timely filed pursuant to the court's order contained in the process. The summons attached by the clerk was surplusage, as O.C.G.A. § 16-13-49 does not require process upon the alleged owner, merely notice to the alleged owner of the proposed condemnation. *Farley v. State*, 180 Ga. App. 694, 350 S.E.2d 263 (1986).

Failure to comply with time requirement of O.C.G.A. § 16-13-49(e) prevents forfeiture. *State v. Luke*, 183 Ga. App. 182, 358 S.E.2d 272 (1987).

Defendant may obtain return of property where state fails to comply with O.C.G.A. § 16-13-49(e). *State v. Ellis*, 156 Ga. App. 779, 275 S.E.2d 361 (1980); *State v. Waters*, 173 Ga. App. 274,

326 S.E.2d 243 (1985).

Relation back of amended claim. — Amended claim against the property seized by the state filed after the 30-day deadline did not relate back to the date of the original answer so as to resurrect the claims. *Roberts v. State*, 226 Ga. App. 824, 487 S.E.2d 667 (1997).

Service on the defendant was proper when, to cure defendant's initial complaints about service, the judge allowed the state to serve the defendant personally in open court and then delayed acting on the matter until the defendant had more than 30 days to respond. *Owens v. State*, 241 Ga. App. 140, 525 S.E.2d 150 (1999).

State was required to perfect service of complaint of forfeiture within 60 days of the seizure of property. *Griffin v. State*, 250 Ga. App. 93, 550 S.E.2d 138 (2001).

State properly initiated a forfeiture action under O.C.G.A. § 16-13-49 because: (1) it posted notice at the courthouse, served the parties with a copy, and published the notice in a local newspaper for three weeks running; and (2) the notice specified the date and extent of the seizure and asserted that the seized property was used or intended for use to facilitate a violation of Georgia's anti-drug statutes. *Germain v. State of Ga.*, 269 Ga. App. 846, 605 S.E.2d 441 (2004).

Dismissal of complaint. — Once the trial court dismissed the state's complaint, there was no action pending, and the state's amendment of the complaint was ineffective. *Franklin v. State*, 227 Ga. App. 30, 488 S.E.2d 109 (1997).

After dismissal of a forfeiture proceeding by the state, all that remained pending was a claim of ownership which was uncontested because it was not shown that the property was evidence or subject to future forfeiture proceedings, and the property was properly returned to the claimant. *Boone v. Sheriff of Lowndes County*, 232 Ga. App. 601, 502 S.E.2d 535 (1998).

Contents of claim in response to notice of seizure. — When an interest holder is responding to a notice of seizure authorized by O.C.G.A. § 16-13-49(n)(1), the claim to property subject to forfeiture must satisfy not only the general pleading

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rules applicable to all civil actions, but must also specifically set forth with particularity the elements enumerated at O.C.G.A. § 16-13-49(n)(4). *Jackson v. State*, 218 Ga. App. 437, 461 S.E.2d 594 (1995); *Roberts v. State*, 226 Ga. App. 824, 487 S.E.2d 667 (1997).

Even though more details could have been included, a claim in response to a notice of seizure of a savings passbook adequately set forth the required elements where it stated the sources of the money in the account, denied that the money was contraband, and stated that the funds were not in close proximity to any property which was subject to forfeiture. *Harris v. State*, 222 Ga. App. 267, 474 S.E.2d 201 (1996).

Failure to file answer. — Use of the word “may” in O.C.G.A. § 16-13-49(o)(3) is only permissive insofar as the word recognizes that a claimant cannot be forced to claim an interest in seized property; however, a claimant who fails to file an answer must suffer the consequence of forfeiting the claimant's property to the state. *Jett v. State*, 230 Ga. App. 655, 498 S.E.2d 274 (1998).

If no answer is made within 30 days after service of the summons and complaint, the trial court is required to order the disposition of the property; a hearing is required only when an answer is filed. *Wilson v. State*, 240 Ga. App. 578, 525 S.E.2d 708 (1999).

The 60-day requirement for holding a hearing is conditioned on the filing of a timely and sufficient answer and, if no answer is filed, no hearing is required, and the court is required to order the disposition of the seized property. *Owens v. State*, 241 Ga. App. 140, 525 S.E.2d 150 (1999).

Because an accused failed to appear or otherwise file an answer in a condemnation proceeding filed against the accused in connection with the accused's arrest for possession of methamphetamine, and the accused failed to show that the accused's counsel was ineffective in failing to file an answer, the state was properly granted judgment. *Walters v. State of Ga.*, 269 Ga. App. 883, 605 S.E.2d 458 (2004).

Contents of answer. — Claimant's motion to dismiss the complaint in a forfeiture action was not a responsive pleading in the nature of an answer since it did not raise an assertion that the property was not subject to forfeiture as required by O.C.G.A. § 16-13-49(o)(3), nor did it contain even a general denial of the averments of the allegations of the complaint as would have satisfied O.C.G.A. § 9-11-8(b). *Turner v. State*, 213 Ga. App. 309, 444 S.E.2d 372 (1994).

Answer to forfeiture complaint was insufficient where the claimant falsely stated that another person did not have a security interest in the vehicle, failed to state the extent of claimant's own interest, and did not cite any provision of O.C.G.A. § 16-13-49 relied on in support of claimant's assertion that the vehicle was not subject to forfeiture. *Mitchell v. State*, 217 Ga. App. 282, 457 S.E.2d 237 (1995).

When the claimant's response alleged sufficient facts within the claimant's personal knowledge, and not merely conclusory allegations, to establish a triable issue as to innocent ownership, a ruling that the claim was procedurally insufficient was vacated and the case remanded to allow the claimant reasonable time to supplement the claimant's response with the material fact of the claimant's acquittal of drug charges. *Knodel v. State*, 222 Ga. App. 514, 474 S.E.2d 700 (1996).

In a procedure for forfeiture of a vehicle, the claimant's answer was sufficient to meet the pleading requirements of O.C.G.A. § 16-13-49 when the answer incorporated copies of the certificate of title and the tag registration and included the date of the purchase, the name of the dealership, and information that the car was financed by the seller. *Williams v. State*, 222 Ga. App. 270, 474 S.E.2d 98 (1996).

Answer by person claiming to be the owner of household furnishings was sufficient even though it failed to indicate when the claimant acquired the items or the identity of their respective transferors; to require such information when an entire complement of household furnishings has been seized would fail to

protect the interests of innocent owners. *Dennis v. State*, 224 Ga. App. 11, 479 S.E.2d 380 (1996).

Claimant's answer to a notice of seizure of currency did not satisfy the requirements of O.C.G.A. § 16-13-49(n)(4) where it stated simply that the currency "represents money saved by the Claimant from numerous jobs that he has held." *Tuggle v. State*, 224 Ga. App. 353, 480 S.E.2d 353 (1997).

Answer to forfeiture complaint covering a large number of guns was insufficient because claimant simply stated that claimant had obtained them through lawful means — through inheritance or purchase, or as gifts — without any dates, identity of transferors, or any other circumstances of claimant's acquisition. *Morrell v. State*, 226 Ga. App. 16, 486 S.E.2d 611 (1997).

Trial court did not err in holding that the claimant's answer did not comply with the strict pleading requirements prescribed in O.C.G.A. § 16-13-49(n)(4). *Serchion v. State*, 230 Ga. App. 336, 496 S.E.2d 333 (1998).

Sufficiency of the claimants' answer under O.C.G.A. § 16-13-49(o)(3) was satisfied when the answer referenced a paragraph in the forfeiture complaint that incorporated a prior consent judgment involving the same property, and the consent judgment designated the claimants as owners of the property in question. *Bell v. State*, 234 Ga. App. 693, 507 S.E.2d 535 (1998).

Claimant's answer pertaining to the claimant's interest in money claimed to have been earned from house cleaning was not sufficient to meet the pleading requirements of O.C.G.A. § 16-13-49 when the claimant did not offer any specifics regarding the method of payment for the claimant's work, nor set forth any information regarding the amount of house cleaning the claimant did to earn the money. *Dearing v. State*, 243 Ga. App. 198, 532 S.E.2d 751 (2000).

Claimant's answer pertaining to the claimant's interest in a rifle, stating that the claimant's father gave the claimant the rifle on a certain date, asserted specific facts of the claimant's ownership, not mere conclusory allegations, and was suf-

ficient to meet the pleading requirements of O.C.G.A. § 16-13-49. *Dearing v. State*, 243 Ga. App. 198, 532 S.E.2d 751 (2000).

Property owners' claims, asserting only that their property was not directly or indirectly used or intended for use in violation of Georgia's anti-drug statutes, and that the property was not part of the proceeds of such illegal activity, were not the responsive pleadings required by O.C.G.A. § 16-13-49(n)(4) because they gave no essential facts about where, how, and from whom the property was obtained; the state had no responsibility to proceed further after the property owners' factually deficient claims were submitted and, thus, the trial court could not reach the property owners' claims regarding the insufficiency of the evidence and did not err in entering an order of disposition on the state's motion. *Germain v. State of Ga.*, 269 Ga. App. 846, 605 S.E.2d 441 (2004).

Trial court properly struck defendant's answer in the state's civil forfeiture action against certain items seized from defendant and others' property pursuant to a search warrant, as defendant's answer merely indicated the source of the funds for obtaining the property, and did not indicate the nature and extent of defendant's interest in the seized property, how defendant had acquired the property, the statutory provision that protected the property from forfeiture, and the relief sought by defendant; further, the answer was not verified, and in the absence of statutory compliance, pursuant to O.C.G.A. § 16-13-49(o)(3), (5), no hearing was required. *Holmes v. State of Ga.*, 270 Ga. App. 882, 608 S.E.2d 325 (2004).

In an action for in rem forfeiture of an owner's vehicle for purposes of O.C.G.A. § 16-13-49(o)(3), the vehicle owner's failure to meet the pleadings requirements, including the necessity of verification, meant that a hearing did not have to be held within 60 days pursuant to § 16-13-49(o)(5). *Portee v. State of Ga.*, 277 Ga. App. 536, 627 S.E.2d 63 (2006).

Claimant's answer was insufficient under O.C.G.A. § 16-13-49(o)(3) in a civil forfeiture proceeding because while the claimant asserted that the currency at issue was pay from various employers, the

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answer did not identify each employer, the dates worked, the amounts received, the nature of the claimant's duties, or any other similar information. *Gravley v. State of Ga.*, 285 Ga. App. 691, 647 S.E.2d 372 (2007).

While an answer to an in rem complaint by the owner of a truck seized by the state failed to reference evidence, namely the transferred title, supporting an interest in the truck, but clearly stated that: (1) the interest was in the amount of \$5,000; (2) the interest originated through the owner's payment of that amount to the creditor; and (3) the interest continued, the owner's answer set forth the nature and extent of the owner's interest in the property as required by O.C.G.A. § 16-13-49(o)(3)(C) with sufficient particularity. *State of Ga. v. Howell*, 288 Ga. App. 176, 653 S.E.2d 330 (2007), cert. denied, 2008 Ga. LEXIS 224 (Ga. 2008).

In a forfeiture case involving \$20,620 found in a footlocker in the home of a drug defendant's grandparent, the grandparent's answer asserting a claim to the cash did not satisfy O.C.G.A. § 16-13-49. It did not adequately explain how the grandparent had obtained the money in question, which was found in the same room with drugs and with clothing belonging to the grandchild. *Edwards v. State of Ga.*, 290 Ga. App. 467, 659 S.E.2d 852 (2008).

State must respond to answer. — Because the trial court found the state had failed to prosecute the complaint and had failed to show good cause as to why the hearing should be continued for a second time, the trial court did not err in dismissing the forfeiture complaint on the grounds that no hearing was conducted within 60 days as required by O.C.G.A. § 16-13-49. *State v. Gonzales*, 213 Ga. App. 661, 445 S.E.2d 808 (1994) (but see *Alford v. State*, 208 Ga. App. 595, 431 S.E.2d 393 (1993)).

Dismissal of a forfeiture proceeding was not required where the state attempted to schedule a hearing 43 days after service of the complaint, and a continuance beyond the 60-day period was caused by the court's crowded calendar. *Hinton v. State*, 224 Ga. App. 49, 479 S.E.2d 424 (1996).

Attachment of deed to correct deficiencies in answer. — Claimants in a forfeiture action corrected any deficiencies in their answer when the claimants filed an amended answer that incorporated by reference a recorded warranty deed, which provided necessary information and corrected the lack of verification by one of the claimants. *Bell v. State*, 234 Ga. App. 693, 507 S.E.2d 535 (1998).

Amendment to correct error in filing answer. — When the failure to file a legally sufficient answer under O.C.G.A. § 16-13-49(o)(3) was clearly the result of a mistake, an amendment to correct the mistake should have been allowed. *Lee v. State*, 225 Ga. App. 733, 484 S.E.2d 777 (1997).

Since the claimant contesting the forfeiture of property was authorized to amend claimant's answer to a forfeiture complaint, the court erred in granting the state's motion to strike the amendment. *Jackson v. State*, 231 Ga. App. 320, 498 S.E.2d 159 (1998).

An amended answer could relate back to a timely-filed but insufficient initial answer. *Rojas v. State*, 269 Ga. 121, 498 S.E.2d 735 (1998).

Defendant waived the issue of whether the trial court improperly forbade amending defendant's answer by failing to take any action to amend the answer for almost 30 days before the court's order was entered, despite defendant's ability to do so as a matter of right. *Waters v. State*, 239 Ga. App. 897, 522 S.E.2d 493 (1999).

Answer begins running of 60-day period. — The 60-day time period in O.C.G.A. § 16-13-49(o)(5), within which the state is to hold a hearing on the issue of forfeiture, does not commence to run until the filing of a sufficient answer, as determined by the requirements of O.C.G.A. § 16-13-49(o)(3) prescribing what must be set forth in the answer. *State v. Alford*, 264 Ga. 243, 444 S.E.2d 76 (1994).

When the defendant's answer did not comply with the specific pleading requirements of O.C.G.A. § 16-13-49(o)(3), it was insufficient to commence the 60-day time period for holding a hearing; reversing in part *State v. Adams*, 212 Ga. App. 309, 444 S.E.2d 372 (1994). *State v. Adams*, 264 Ga.

842, 452 S.E.2d 117 (1995).

Verification of answer. — Answers including verifications signed under oath before a notary public satisfied the requirements of O.C.G.A. § 16-13-49(o)(3). *Dearing v. State*, 243 Ga. App. 198, 532 S.E.2d 751 (2000).

Vehicle owner failed to sufficiently support the claim that, while incarcerated, the owner was denied access to legal information and to an individual who would notarize an answer to the state's civil in rem forfeiture proceeding; it was not error to deny a continuance in order to have the answer verified, as required by O.C.G.A. § 16-13-49(o)(3), or in striking the owner's answer. *Portee v. State of Ga.*, 277 Ga. App. 536, 627 S.E.2d 63 (2006).

Legally insufficient answer tolls 60-day period. — State's forfeiture complaint did not have to be held within the 60-day deadline imposed by O.C.G.A. § 16-13-49 since the claimant's answer was legally insufficient when the claimant's verification was not executed under penalty of perjury, and the complaint did not satisfy the specific pleading requirements as required to substantiate claimant's claims of ownership of the seized property. *State v. Miller*, 234 Ga. App. 650, 507 S.E.2d 521 (1998).

Time period of O.C.G.A. § 16-13-49(h)(2). — By failing to request the return of seized currency prior to the entry of judgment, the owners were precluded from asserting a claim to the property, even though the state did not file its complaint for civil forfeiture within 60 days after the seizure. *Yoder v. State*, 211 Ga. App. 226, 438 S.E.2d 226 (1993).

Actual date of the seizure is not counted for purposes of determining the running of the 60-day limitation period. *Nash v. State*, 243 Ga. App. 800, 534 S.E.2d 492 (2000).

Time provisions of subsection (n). — Time provisions of O.C.G.A. § 16-13-49(n) operate independently of the 60-day requirement of O.C.G.A. § 16-13-49(h)(2) and provide an alternative procedure for cases which involve personal property with a value of \$25,000 or less. If the provisions of subsection (n) are followed, the 60-day period outlined in paragraph (h)(2) may be extended.

Robinson v. State, 209 Ga. App. 446, 433 S.E.2d 707 (1993); *State v. Profit*, 213 Ga. App. 270, 444 S.E.2d 356 (1994).

In the forfeiture complaint, described in O.C.G.A. § 16-13-49(o)(1), the state is not required to plead essential facts. *Hinton v. State*, 224 Ga. App. 49, 479 S.E.2d 424 (1996).

Hearing on in rem proceedings. — Requirement of O.C.G.A. § 16-13-49(o)(5) that a hearing be held within 60 days of service of a complaint is mandatory, not directory. *Henderson v. State*, 205 Ga. App. 542, 422 S.E.2d 666 (1992), *aff'd*, 263 Ga. 508, 436 S.E.2d 209 (1993); *State v. Henderson*, 263 Ga. 508, 436 S.E.2d 209 (1993); *Blanks v. State*, 240 Ga. App. 175, 522 S.E.2d 770 (1999); *State v. Carter*, 244 Ga. App. 560, 536 S.E.2d 230 (2000); *Griffin v. State*, 250 Ga. App. 93, 550 S.E.2d 138 (2001).

Continuance inappropriate. — It was error to grant a continuance to the state where the state failed to comply with the statutory time requirements applicable to the hearing on a forfeiture complaint and where the only "cause" for granting the continuance was the claimant's refusal to go forward with a hearing about which they had prior notice. *Jackson v. State*, 212 Ga. App. 340, 441 S.E.2d 811 (1994).

Continuance appropriate. — Trial court did not abuse the court's discretion in granting the State of Georgia's motion for a continuance beyond the 60-day limit of a hearing in a civil forfeiture action in order that the state would have more time to perfect service on a second claimant so that one forfeiture proceeding could be held to resolve the matter as to all potential claimants; such constituted good cause for a continuance pursuant to O.C.G.A. § 16-13-49(o)(5). *State of Ga. v. Richardson*, 276 Ga. App. 784, 625 S.E.2d 52 (2005).

Trial court is required to give notice of order denying application to recover seized currency. — In an application to recover seized currency under O.C.G.A. § 16-13-49(q)(4), a trial court erred in denying the owner's motion to set aside the order denying the application without making the finding required by O.C.G.A. § 15-6-21(c) as to whether the

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owner or the owner's counsel had received notice of the order. Remand was required. *Grant v. State*, 302 Ga. App. 739, 691 S.E.2d 623 (2010).

O.C.G.A. § 16-13-49 is a special statutory proceeding which must be strictly construed and complied with, and as such, not all provisions of the Civil Practice Act apply including O.C.G.A. § 9-11-55, the default judgment statute. *Fulton v. State*, 183 Ga. App. 570, 359 S.E.2d 726 (1987).

Dismissal for failure to respond appropriate. — Uniform Superior Court Rule 14 provides for dismissal of a pleading (not a final adjudication on the merits) "where appropriate" for failure to respond to a calendar call. Because a proceeding for forfeiture is a special statutory proceeding to which default is not applicable, this would not be "appropriate." *Fulton v. State*, 183 Ga. App. 570, 359 S.E.2d 726 (1987).

Procedures for opening default as a matter of right under O.C.G.A. § 9-11-55(a) are applicable, pursuant to O.C.G.A. § 9-11-81, in forfeiture actions under O.C.G.A. § 16-13-49. *Ford v. State*, 271 Ga. 162, 516 S.E.2d 778 (1999), reversing *Ford v. State*, 235 Ga. App. 755, 509 S.E.2d 734 (1998) and overruling *State v. Britt Caribe, Ltd.*, 154 Ga. App. 476, 268 S.E.2d 702 (1980).

Dismissal of an appeal was not justified when a losing party in a drug-related forfeiture proceeding failed to take affirmative action to prevent enforcement of the complained-of judgment prior to the expiration of the 30-day period for filing a notice of appeal. *State v. Vurgess*, 182 Ga. App. 544, 356 S.E.2d 273 (1987).

Dismissal of appeal denied when notice timely. — In a civil forfeiture proceeding, the state's motion to dismiss a claimant's appeal was denied since the claimant's notice of appeal was timely filed within 30 days following the entry of the order of distribution. *Weaver v. State*, 299 Ga. App. 718, 683 S.E.2d 361 (2009), cert. denied, No. S10C0024, 2010 Ga. LEXIS 128 (Ga. 2010).

It was error to enter protective order suspending discovery indefi-

nitely in a forfeiture condemnation case based on statements of the district attorney which were conclusional and bereft of facts. *Christopher v. State*, 185 Ga. App. 532, 364 S.E.2d 905 (1988).

In petitions for condemnation, district attorney's verification that allegations are true and correct to the best of the district attorney's knowledge and belief is a proper verification "by a duly authorized agent of the state." *Chester v. State*, 168 Ga. App. 618, 309 S.E.2d 897 (1983).

Substantial compliance sufficed. — Consistent with O.C.G.A. § 16-13-49(z), where the state amended its complaint to include the requisite verification and, therefore, substantially complied with that section, the trial court did not err in failing to grant plaintiff's motion to dismiss. *McMichen v. State*, 209 Ga. App. 169, 433 S.E.2d 92 (1993).

Document insufficient. — Document filed by claimant was not sufficient for the purpose of meeting the 30-day requirement for the filing of claims in O.C.G.A. § 16-13-49(n). *State v. Cannon*, 214 Ga. App. 897, 449 S.E.2d 519 (1994).

Failure of claim filed. — Failure of purported claim filed rendered it ineffective as a trigger to require the district attorney to file a complaint under O.C.G.A. § 16-13-49(n)(5) in response to it. *State v. Cannon*, 214 Ga. App. 897, 449 S.E.2d 519 (1994).

When claimant's answer was deficient under O.C.G.A. § 16-13-49(n), the trial court could not reach the claimant's claims regarding the sufficiency of the evidence and did not err in entering an order of forfeiture. *Greene v. State*, 220 Ga. App. 292, 469 S.E.2d 428 (1996).

To raise a valid double jeopardy claim based on an earlier in rem forfeiture, a defendant must first file an effective answer claiming an interest in the property forfeited. *Eaton v. State*, 220 Ga. App. 578, 469 S.E.2d 740 (1996).

Hearsay information from informant allowed into evidence. — Trial court did not err in allowing hearsay testimony into evidence, i.e., information from an informant which eventually led to obtaining a search warrant for the defendant's property. *Rabern v. State*, 221 Ga.

App. 874, 473 S.E.2d 547 (1996), remanded, 231 Ga. App. 84, 497 S.E.2d 631 (1998).

Criminal prosecution not barred by double jeopardy. — Civil forfeiture proceeding in a drug case was not a criminal prosecution for purposes of double jeopardy. *Sutton v. State*, 223 Ga. App. 721, 478 S.E.2d 910 (1996); *Murphy v. State*, 219 Ga. App. 474, 465 S.E.2d 497 (1995), aff'd, 267 Ga. 120, 475 S.E.2d 907 (1996); *Rojas v. State*, 226 Ga. App. 688, 487 S.E.2d 455 (1997); *Cuellar v. State*, 230 Ga. App. 203, 496 S.E.2d 282 (1998).

Proving weight of cocaine. — Evidence that a 1.8-gram sample tested "positive" for cocaine did not meet the state's burden of proving that the contraband involved more than a gram of cocaine. *State v. Foote*, 225 Ga. App. 222, 483 S.E.2d 628 (1997).

Because evidence established probable cause that defendant possessed cocaine with the intent to distribute, it was unnecessary for the state to establish possession of more than one gram of cocaine merely because defendant had pled guilty to possession of cocaine rather than possession with intent to distribute. *Wilson v. State*, 240 Ga. App. 578, 525 S.E.2d 708 (1999).

Evidence that a seized substance tested positive for cocaine and that it weighed 6.8 grams was insufficient to show that the substance constituted more than one gram of cocaine because it was not tested for purity. *Bell v. State*, 249 Ga. App. 296, 548 S.E.2d 35 (2001).

In a forfeiture proceeding, expert testimony that 1.2 grams of cocaine were seized from defendant's vehicle was sufficient to support the trial court's finding that more than one gram of cocaine was involved in the case. Furthermore, it was not necessary to prove the purity of the cocaine seized from defendant's vehicle as such a showing was not required under O.C.G.A. § 16-13-49(e)(2) because the statute specifically referenced "mixtures." *Turner v. State of Ga.*, 265 Ga. App. 40, 592 S.E.2d 864 (2004).

Automatic stay. — Pending civil forfeiture action against the property of bankruptcy debtors' estate was subject to automatic stay, notwithstanding the "police or regulatory power" stay exception of 11

U.S.C. § 362(b). In re *Bell*, 215 Bankr. 266 (Bankr. N.D. Ga. 1997).

Determining whether a forfeiture is excessive requires the trial court to consider *Thorp v. State*, 264 Ga. 712, 450 S.E.2d 416 (1994), and to make findings on the three factors required by that decision. *Salmon v. State*, 249 Ga. App. 591, 549 S.E.2d 421 (2001).

Evidence insufficient for forfeiture. — Because it was determined that a parcel of land which contained defendant's residence was subject to forfeiture, but the state failed to prove which of the parcels described in the complaint contained the residence, the evidence was insufficient to support forfeiture. *Stancil v. State*, 230 Ga. App. 240, 495 S.E.2d 870 (1998).

Trial court could not order the forfeiture of a piece of property and thereafter receive evidence in order to determine which piece of property the court had ordered forfeited. *Stancil v. State*, 230 Ga. App. 240, 495 S.E.2d 870 (1998).

Evidence other than confidential informant's testimony was ample. — Trial court's finding that, except for the description the confidential informant gave of the vehicle and occupants, no other evidence was presented, was error as a matter of fact since there was an ample amount of other evidence to establish the informant's reliability and basis of knowledge. *State v. Tucker*, 242 Ga. App. 3, 528 S.E.2d 523 (2000).

Failure to show harm. — When the claimant did not show how the claimant was harmed by the state's mere recitation in its forfeiture notice of the applicable provision for filing answers, without expressly informing the claimant of the 30-day period within which a claim must be submitted, the trial court did not err by failing to dismiss the state's notice. *Serchion v. State*, 230 Ga. App. 336, 496 S.E.2d 333 (1998).

Dismissal not appropriate even though state filed complaint late. — Claimant was not entitled to dismissal of an O.C.G.A. § 16-13-49(n) forfeiture action, even though the complaint was not timely filed by the state, because the claimant's remedy—return of the car pending further forfeiture proceedings—served no useful purpose since a hearing

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on the merits of the forfeiture claim was pending when the claimant filed the motion. *Smith v. State*, 301 Ga. App. 870, 690 S.E.2d 208 (2010).

Seizure

Extent of property subject to forfeiture. — Legislature did not intend that all of the property on which a drug violation occurred was subject to forfeiture. *State v. Wilbanks*, 208 Ga. App. 422, 430 S.E.2d 668 (1993).

Seized property cannot be assigned to a third party. — Condemnee's attempt to assign property seized after a civil forfeiture action is against legislative intent because the legislature did not intend that property owners of seized property be allowed to execute a post-seizure assignment of that property to a third party. *Allmond v. State*, 202 Ga. App. 902, 415 S.E.2d 924 (1992).

Property improperly seized. — Forfeiture order for property seized during a search of defendant's home was reversed as there were no exigent circumstances justifying a warrantless entry into defendant's home after drugs, drug-related items, and a weapon were found in defendant's car during a traffic stop, even though defendant did not end a cell phone call immediately as instructed by a police officer; the state did not show that the warrantless entry was required to prevent the destruction of contraband or that securing the home until a warrant could be obtained was not sufficient. *Curry v. State*, 271 Ga. App. 672, 610 S.E.2d 635 (2005).

Abandoned cocaine properly seized. — After law officers observed the defendant throw a paper napkin containing a quantity of cocaine from a car, defendant affirmatively abandoned the cocaine by throwing the cocaine from the vehicle as the officers approached, and placed the cocaine within plain view on the public highway. Since neither abandoned property nor items in plain view of law enforcement officers who are where the officers have a right to be can be the subject of a motion to suppress when the abandonment of the evidence and the si-

multaneous placing of the evidence in plain view occurs during the course of a legal stop, the trial court erred in granting the defendant's motion to suppress. *State v. Howell*, 180 Ga. App. 449, 349 S.E.2d 476 (1986).

Pursuit and seizure found reasonable. — Once law enforcement officers made one unsuccessful attempt to apprehend a car and the car's driver as the car left the scene of an earlier narcotic "buy" and when defendant came to the parked vehicle while officers had the car under observation as the officers awaited the arrival of paperwork authorizing seizure of the car, it became necessary, once authorization to make a warrantless seizure was received, to devise a practical means of seizing the car (and the car's driver) before the car left the jurisdiction, calling for a marked police car, equipped with lights and sirens, to effect the actual pursuit and seizure was reasonable, and the state had probable cause to effect a seizure of the vehicle. *State v. Howell*, 180 Ga. App. 449, 349 S.E.2d 476 (1986).

There was substantial compliance with O.C.G.A. § 16-13-49 after the supervisor of the seizing officer, rather than the seizing officer personally, signed the letter notifying the district attorney of the seizure. *State v. Battise*, 177 Ga. App. 583, 340 S.E.2d 240 (1986).

Seizure not pursuant to judicial process. — Since a Georgia county investigator did not take possession of a vehicle pursuant to judicial process, but simply took the vehicle from the custody of the Tennessee authorities, who had allegedly seized the vehicle pursuant to a search warrant; although O.C.G.A. § 16-13-49 allows for the seizure of property without benefit of judicial process under certain specified circumstances, reliance on the search warrant exception is misplaced because the Georgia officials did not seize the vehicle under the authority of the Tennessee warrant and also because there was not evidence to support the allegation that the seizure of the vehicle was authorized by the Tennessee warrant, and reliance on the "probable cause" exception is also misplaced, as that provision clearly does not purport to authorize Georgia law enforcement officers to seize property lo-

cated outside of the state, nor, in any event, would such authorization be of any legal effect. *Morrow v. State*, 186 Ga. App. 615, 367 S.E.2d 854 (1988).

Reasonable suspicion found for Terry stop thereby allowing forfeiture. — Civil forfeiture order was affirmed and suppression motion was properly denied as drugs were found in defendant's possession after an arrest following a Terry stop as the officer had a reasonable suspicion of criminal activity where the officer had been advised of defendant's banishment, which defendant acknowledged to be violating; the officer was charged with enforcing court orders and, although the banishment was illegal, the order had not been challenged at the time of the Terry stop. *Sanders v. State*, 259 Ga. App. 422, 577 S.E.2d 94 (2003).

In an in rem forfeiture case in which: (1) the federal government lawfully seized the currency under 18 U.S.C. § 981(b)(2)(A)-(C) since the search and seizure of a van's contents were lawful under the Fourth Amendment; (2) the seizure was lawful under O.C.G.A. § 16-13-49(e)(2); and (3) the claimant argued that the federal government did not have standing to initiate the forfeiture proceeding because Georgia did not lawfully seize the currency, the claimant's argument failed. *United States v. \$175,722.77, in United States Currency*, No. 06-11701, 2007 U.S. App. LEXIS 10899 (11th Cir. May 8, 2007) (Unpublished).

Law enforcement officers. — O.C.G.A. § 16-13-49(j) does not apply to a law enforcement officer who, in the performance of the officer's official duty, supplies information leading to the seizure of property which the state may cause to be forfeited under that section. *Palmer v. State*, 250 Ga. 219, 297 S.E.2d 22 (1982).

Property need only fall into one subsection (d) category. — State need only prove that the property as to which forfeiture is sought falls within one of the six categories listed in O.C.G.A. § 16-13-49(d) in order to prevail. *Pitts v. State*, 207 Ga. App. 606, 428 S.E.2d 650 (1993).

Company owner of truck could not claim "innocent ownership" because

the company offered no evidence to meet the burden of showing by a preponderance of the evidence that, with the exercise of ordinary care, the company could not reasonably have known of defendant's conduct or that the conduct was likely to occur. *State v. Tucker*, 242 Ga. App. 3, 528 S.E.2d 523 (2000).

In a forfeiture action, a relative failed to prove that the relative was an innocent owner under O.C.G.A. § 16-13-49(e)(1)(A) of two luxury vehicles seized from a relation, who was arrested for drug violations, as the evidence showed that the relative did not acquire title to the vehicles until after the relation's arrest and, therefore, the relative was merely a "straw man" set up to hold the cars and prevent the seizure. *Martin v. State*, 291 Ga. App. 902, 663 S.E.2d 307 (2008).

Search of vehicle subject to forfeiture. — Defendants' vehicle became subject to forfeiture when law enforcement officers witnessed an illegal transaction therein and defendants then had no property right in the vehicle or right to object to its search and seizure. *United States v. Major*, 915 F. Supp. 384 (M.D. Ga. 1996).

Money found on defendant's person. — Money found on defendant's person, which was not in close proximity to the areas in which the contraband was found, which was not shown to have directly or indirectly used or intended for use in a manner to facilitate a violation of the Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., and which was not shown to have been subject to forfeiture under any other provision of the Act was not subject to forfeiture. *Pitts v. State*, 207 Ga. App. 606, 428 S.E.2d 650 (1993).

Proximity of money and contraband close enough. — Evidence factually established proximity close enough to warrant forfeiture of the money where the \$4,010 was located in the cab of the pickup truck, and the contraband was located in the bed of the same pickup truck. *State v. Tucker*, 242 Ga. App. 3, 528 S.E.2d 523 (2000).

Transaction involving an imitation controlled substance. — Forfeiture statute did not apply to a transaction involving an imitation controlled substance; reversing *State v. White*, 210 Ga.

Seizure (Cont'd)

App. 876, 437 S.E.2d 826 (1993). *White v. State*, 264 Ga. 547, 448 S.E.2d 354 (1994).

Impoundment and subsequent inventory search of a vehicle were valid since the vehicle was subject to possible seizure as property used to facilitate illegal drug distribution. *Hightower v. State*, 249 Ga. App. 495, 548 S.E.2d 473 (2001).

Vehicles properly forfeited. — Denial of the owner's motion to suppress was proper since the police officer was rightfully on the premises to ask questions about an anonymous letter; the owner's vehicles were properly forfeited because they facilitated, or were in close proximity to, illegal drug activity. *Hodge v. State*, 257 Ga. App. 203, 570 S.E.2d 666 (2002).

Forfeiture of a pickup truck and a trailer used to commit a burglary was upheld since: (1) the state's burden of proof was "by a preponderance of the evidence" and not "beyond a reasonable doubt" as alleged by the property owner; (2) the state was not required to prove a burglary conviction under O.C.G.A. § 16-7-1, or that charges were even filed; and (3) whether a burglary took place without the owner's knowledge or consent was a fact question to be resolved by the court, which as the trier of fact, was not

obligated to believe a witness even if the testimony was uncontradicted. *Walker v. State of Ga.*, 281 Ga. App. 526, 636 S.E.2d 705 (2006).

Lien for towing service. — Because O.C.G.A. § 16-13-49 had no clear and explicit terms providing a lien for towing and storing a vehicle at the request of a law enforcement agency, it provided the operator of a towing business no lien for the services. *Purser Truck Sales, Inc. v. Horton*, 276 Ga. App. 17, 622 S.E.2d 405 (2005).

Security interest not barred. — After a father sold a truck to the son in exchange for the son's personal pledge and acknowledgement of a security interest in the truck, although a security interest or lien was never filed, the trial court erred in the state's forfeiture proceeding in denying enforcement of the father's security interest after the truck was seized due to the son's possession of drugs, as the father's evidence that the father had no actual or constructive knowledge of the son's illegal activities was uncontradicted; the fact that the security interest was never perfected did not bar the father's assertion of the interest or the enforcement thereof pursuant to O.C.G.A. § 16-13-49(e)(1). *Tolliver v. State of Ga.*, 276 Ga. App. 755, 625 S.E.2d 403 (2005).

OPINIONS OF THE ATTORNEY GENERAL

Full-time peace officer not entitled to proceeds. — Full-time peace officer who, while acting within the scope of the officer's official duties, plays a part in the seizure of property which is later forfeited under O.C.G.A. § 16-13-49 is not entitled to receive a portion from the proceeds of the sale of such property pursuant to O.C.G.A. § 16-13-49(j). 1983 Op. Att'y Gen. No. U83-14 (rendered prior to 1991 amendment).

Payment of salary of prosecuting attorney prohibited. — O.C.G.A. § 16-13-49(u)(4)(D)(i) and (ii) prohibit the use of the proceeds of forfeited and condemned property to pay the salary of the Executive Director/Prosecuting Attorney of the Multi-Agency Narcotics Squad in a circuit. 1992 Op. Att'y Gen. No. U92-22.

National Guard is eligible to share in proceeds of drug-related forfeitures with respect to statutorily authorized activities. 1995 Op. Att'y Gen. No. 95-29.

Georgia Aviation Authority is not a law enforcement agency within the meaning of O.C.G.A. § 16-13-49 for the purpose of sharing in forfeiture funds. 2011 Op. Att'y Gen. No. 11-3.

Payment of salaries of law enforcement officers. — Under O.C.G.A. §§ 16-13-48.1 and 16-13-49(u)(4)(D)(i), federal forfeiture funds may not be used to pay the salaries of law enforcement officers including overtime pay and other benefits. 2002 Op. Att'y Gen. No. 2002-5.

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Drugs and Controlled Substances, § 214 et seq.

C.J.S. — 28 C.J.S., Drugs and Narcotics, §§ 233, 235 et seq. 79 C.J.S., Searches and Seizures, § 220.

U.L.A. — Uniform Controlled Substances Act (U.L.A.) § 505.

ALR. — Lawfulness of seizure of property used in violation of law as prerequisite to forfeiture action or proceeding, 8 ALR3d 473.

Forfeiture of money to state or local authorities based on its association with or proximity to other contraband, 38 ALR4th 496.

Necessity of conviction of offense associated with property seized in order to support forfeiture of property to state or local authorities, 38 ALR4th 515.

Forfeiture of property held in marital estate under Uniform Controlled Substances Act or similar statute, 84 ALR4th 620.

Validity and construction of provisions of Uniform Controlled Substances Act providing for forfeiture hearing before law enforcement officer, 84 ALR4th 637.

Real property as subject of forfeiture under Uniform Controlled Substances Act or similar statutes, 86 ALR4th 995.

Timeliness of institution of proceedings for forfeiture under Uniform Controlled Substances Act or similar statute, 90 ALR4th 493.

Effect of forfeiture proceedings under Uniform Controlled Substances Act or similar statute on lien against property subject to forfeiture, 1 ALR5th 317.

Forfeiture of property, under Uniform Controlled Substances Act or similar statute, where property or evidence supporting forfeiture was illegally seized, 1 ALR5th 346.

Application of forfeiture provisions of Uniform Controlled Substances Act or similar statute where drugs were possessed for personal use, 1 ALR5th 375.

Forfeiture of property under Uniform Controlled Substances Act or similar statute where amount of controlled substances seized is small, 6 ALR5th 652.

Delay in setting hearing date or in holding hearing as affecting forfeiture un-

der Uniform Controlled Substances Act or similar statute, 6 ALR5th 711.

Validity, construction, and application of state or local law prohibiting maintenance of vehicle for purpose of keeping or selling controlled substances, 31 ALR5th 760.

Propriety of civil or criminal forfeiture of computer hardware or software, 39 ALR5th 87.

Burden of proof and presumptions in tracing currency, bank account, or cash equivalent to illegal drug trafficking so as to permit forfeiture, or declaration as contraband, under state law, 104 ALR5th 229.

Evidence considered in tracing currency, bank account, or cash equivalent to illegal drug trafficking so as to permit forfeiture, or declaration as contraband, under state law — Proximity of asset to drugs, paraphernalia, or records, 115 ALR5th 403.

Evidence considered in tracing currency, bank account, or cash equivalent to illegal drug trafficking so as to permit forfeiture, or declaration as contraband, under state law — Odor of drugs, 116 ALR5th 325.

Evidence considered in tracing currency, bank account, or cash equivalent to illegal drug trafficking so as to permit forfeiture, or declaration as contraband, under state law — Explanation or lack thereof, 4 ALR6th 113.

Validity, construction, and application of criminal forfeiture provisions of Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 USCS § 853), 88 ALR Fed. 189.

Seizure or forfeiture of real property used in illegal possession, manufacture, processing, purchase, or sale of controlled substances under § 511(a)(7) of Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 USCS § 881(a)(7)), 104 ALR Fed. 288.

Who is exempt from forfeiture of drug proceeds under "innocent owner" provision of 21 USCS § 881(a)(6), 109 ALR Fed. 322.

What constitutes establishment of prima facie case for forfeiture of real prop-

erty traceable to proceeds from sale of and Control Act of 1970 (21 USCA § 881(a)(6)), 146 ALR Fed. 597.

16-13-50. Burden of proof; liability of enforcement officers in lawful performance of duties.

(a) It is not necessary for the state to negate any exemption or exception in this article in any complaint, accusation, indictment, or other pleading or in any trial, hearing, or other proceeding under this article. The burden of proof of any exemption or exception is upon the person claiming it.

(b) In the absence of proof that a person is the duly authorized holder of an appropriate registration or order form issued under this article, he is presumed not to be the holder of the registration or form. The burden of proof is upon him to rebut the presumption.

(c) No liability is imposed by this article upon any authorized state, county, or municipal officer engaged in the lawful performance of his duties. (Code 1933, § 79A-829, enacted by Ga. L. 1974, p. 221, § 1.)

JUDICIAL DECISIONS

Former Code 1933, § 79A-829 was not unconstitutional upon the statute's face. *Strong v. State*, 246 Ga. 612, 272 S.E.2d 281 (1980) (see O.C.G.A. § 16-13-50).

Defendant need not prove prescription was written for legitimate medical purpose. — O.C.G.A. § 16-13-50 would be unconstitutionally applied if the trial court were to charge that the statute requires the defendant to prove that medical prescriptions were written for legitimate medical purpose within the meaning of O.C.G.A. § 16-13-41(f)(3) rather than charging that the state is required to prove beyond a reasonable doubt those allegations of the indictment. *Strong v. State*, 246 Ga. 612, 272 S.E.2d 281 (1980).

Qualification of expert to perform drug analysis. — When a pretrial hearing to determine whether an expert designated by appellant was qualified to perform analysis of alleged drugs revealed that the expert was neither licensed, registered, nor otherwise exempted pursuant to O.C.G.A. Ch. 13, T. 16, and when the trial court gave defense counsel approximately 24 hours to determine whether counsel wished to qualify this expert for

any procedures which did not require reference samples of the controlled substance, or to qualify another expert, and counsel did neither, it was not an abuse of discretion to deny the motion for independent laboratory analysis. *McAdoo v. State*, 164 Ga. App. 23, 295 S.E.2d 114 (1982).

Court must instruct jury on specific exemption raised as sole defense. — Question of fact was presented as to the applicability of statutory exception, and it was error to fail to instruct jury on specific exemption raised by defendant as defendant's sole defense. *Bryan v. State*, 157 Ga. App. 635, 278 S.E.2d 177 (1981).

Co-owner who asserts the innocent owner exception under the statute has a two-fold burden. First, in order to establish standing to contest the forfeiture, the co-owner has the burden of proving the nature and extent of the co-owner's interest in the property. Second, the co-owner must prove by a preponderance of the evidence that the co-owner is entitled to the exception as defined by the statute. *State v. Jackson*, 197 Ga. App. 619, 399 S.E.2d 88 (1990).

Cited in *McGuire v. State*, 137 Ga. App. 369, 223 S.E.2d 764 (1976); *Porterfield v.*

State, 137 Ga. App. 449, 224 S.E.2d 94 (1976); Jones v. State, 145 Ga. App. 224, 243 S.E.2d 645 (1978); First Bank & Trust v. State, 150 Ga. App. 436, 258 S.E.2d 59

(1979); Corbitt v. State, 169 Ga. App. 739, 315 S.E.2d 25 (1984); Sellers v. State, 182 Ga. App. 277, 355 S.E.2d 770 (1987).

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Drugs and Controlled Substances, § 196.

C.J.S. — 28 C.J.S., Drugs and Narcotics, §§ 249, 256. 28A C.J.S., Drugs and Narcotics, §§ 342 et seq., 359 et seq. 67 C.J.S., Officers, § 206.

U.L.A. — Uniform Controlled Substances Act (U.L.A.) § 506.

ALR. — Instruction applying rule of reasonable doubt specifically to particular

matter or defense as curing instruction placing burden of proof upon defendant in that regard, 120 ALR 591.

Burden of proof and presumptions in tracing currency, bank account, or cash equivalent to illegal drug trafficking so as to permit forfeiture, or declaration as contraband, under state law, 104 ALR5th 229.

16-13-51. Judicial review of administrative determinations, findings, and conclusions.

All final determinations, findings, and conclusions of the State Board of Pharmacy under this article are final and conclusive decisions of the matters involved. Any person aggrieved by the decision may obtain review of the decision in the Superior Court of Fulton County. Findings of fact by the State Board of Pharmacy, if supported by substantial evidence, are conclusive. (Code 1933, § 79A-830, enacted by Ga. L. 1974, p. 221, § 1; Ga. L. 1982, p. 3, § 16.)

JUDICIAL DECISIONS

Cited in Georgia State Bd. of Pharmacy v. Purvis, 155 Ga. App. 597, 271 S.E.2d 870 (1980).

RESEARCH REFERENCES

C.J.S. — 28 C.J.S., Drugs and Narcotics, §§ 213, 219. 73A C.J.S., Public Administrative Law and Procedure, § 313 et seq.

U.L.A. — Uniform Controlled Substances Act (U.L.A.) § 507.

ALR. — Review for excessiveness of sentence in narcotics case, 55 ALR3d 812.

16-13-52. Programs and research on prevention of abuse of controlled substances; confidentiality of research; exemption from penalties.

(a) The State Board of Pharmacy and the Georgia Drugs and Narcotics Agency shall carry out programs designed to prevent and deter misuse and abuse of controlled substances.

(b) The State Board of Pharmacy and the Georgia Drugs and Narcotics Agency shall encourage research on misuse and abuse of controlled substances. In connection with the research and in furtherance of the enforcement of this article, they may:

(1) Establish methods to assess accurately the effects of controlled substances and identify and characterize those with potential for abuse;

(2) Make studies and undertake programs of research to:

(A) Develop new or improved approaches, techniques, systems, equipment, and devices to strengthen the enforcement of this article;

(B) Determine patterns of misuse and abuse of controlled substances and the social effects thereof;

(C) Improve methods for preventing, predicting, understanding, and dealing with the misuse and abuse of controlled substances; and

(3) Enter into agreements with public agencies, institutions of higher education, and private organizations or individuals for the purpose of conducting research, demonstrations, or special projects which bear directly on misuse and abuse of controlled substances.

(c) The State Board of Pharmacy, in the public interest, may authorize persons engaged in research on the use and effects of controlled substances to withhold the names and other identifying characteristics of individuals who are the subjects of the research. Persons who obtain this authorization are not to be compelled in any civil, criminal, administrative, legislative, or other proceeding to identify the individuals who are the subjects of research for which the authorization was obtained.

(d) The State Board of Pharmacy may authorize the possession and distribution of controlled substances by persons engaged in research. Persons who obtain this authorization are exempt from state prosecution for possession and distribution of controlled substances to the extent of the authorization. (Code 1933, § 79A-831, enacted by Ga. L. 1974, p. 221, § 1; Ga. L. 1982, p. 3, § 16.)

RESEARCH REFERENCES

C.J.S. — 28 C.J.S., Drugs and Narcotics, §§ 211, 212, 219.

U.L.A. — Uniform Controlled Substances Act (U.L.A.) § 508.

16-13-53. Pending proceedings.

(a) Prosecution for any violation of law occurring prior to July 1, 1974, is not affected or abated by this article. If the offense which was being prosecuted is similar to one set out in this article, then the penalties under this article apply if they are less than those under prior law.

(b) Civil seizures or forfeitures and injunctive proceedings commenced prior to July 1, 1974, are not affected by this article.

(c) All administrative proceedings pending under prior laws which were superseded by this article shall be continued and brought to a final determination in accord with the laws and rules in effect prior to July 1, 1974. Any substance controlled under prior law which is not listed within Schedules I through V is automatically controlled without further proceedings and shall be listed in the appropriate schedule.

(d) This article applies to violations of law, seizures, forfeitures, injunctive proceedings, administrative proceedings, and investigations occurring after July 1, 1974. (Code 1933, § 79A-832, enacted by Ga. L. 1974, p. 221, § 1.)

RESEARCH REFERENCES

U.L.A. — Uniform Controlled Substances Act (U.L.A.) § 601.

16-13-54. Orders and rules promulgated prior to July 1, 1974.

Any orders and rules promulgated under any law affected by this article and in effect on July 1, 1974, and not in conflict with it shall continue in effect until modified, superseded, or repealed. (Code 1933, § 79A-833, enacted by Ga. L. 1974, p. 221, § 1.)

RESEARCH REFERENCES

U.L.A. — Uniform Controlled Substances Act (U.L.A.) § 602.

16-13-55. Construction of article.

This article shall be so applied and construed as to effectuate its general purpose to make uniform the law with respect to the subject of this article among those states which enact it. (Code 1933, § 79A-834, enacted by Ga. L. 1974, p. 221, § 1.)

RESEARCH REFERENCES

C.J.S. — 82 C.J.S., Statutes, § 486 et seq.

U.L.A. — Uniform Controlled Substances Act (U.L.A.) § 603.

16-13-56. Penalty for violation of article; restitution to the state for cleanup of environmental hazards; other remedies.

(a) Unless otherwise specified with respect to a particular offense, any person who violates any provision of this article shall be guilty of a misdemeanor.

(b) In addition to any other penalty imposed by law for a violation of this article, if the sentencing court finds that in committing a violation of this article, the defendant contributed to a release of hazardous waste, a hazardous constituent, or a hazardous substance as such terms are defined by Code Sections 12-8-62 and 12-8-92, the court shall require such defendant to make restitution to the State of Georgia pursuant to subsection (a) of Code Section 12-8-96.1 for the reasonable costs of activities associated with the cleanup of environmental hazards, including legal expenses incurred by the state. Restitution made pursuant to this Code section shall not preclude the State of Georgia from obtaining any other civil or criminal remedy available under any other provision of law. The restitution authorized by this Code section is supplemental and not exclusive. (Code 1981, § 16-13-56, enacted by Ga. L. 1985, p. 1219, § 7; Ga. L. 2001, p. 816, § 2.)

Cross references. — Hazardous waste, T. 12, C. 8, A. 3.

JUDICIAL DECISIONS

Cited in *Fair v. State*, 284 Ga. 165, 664 S.E.2d 227 (2008).

PART 2**ELECTRONIC DATA BASE OF PRESCRIPTION INFORMATION**

Effective date. — This part became effective July 1, 2011.

16-13-57. Program to record prescription information into electronic database; administration and oversight.

(a) Subject to funds as may be appropriated by the General Assembly or otherwise available for such purpose, the agency shall, in consultation with members of the Georgia Composite Medical Board, establish

and maintain a program to electronically record into an electronic data base prescription information resulting from the dispensing of Schedule II, III, IV, or V controlled substances and to electronically review such prescription information that has been entered into such data base. The purpose of such program shall be to assist in the reduction of the abuse of controlled substances, to improve, enhance, and encourage a better quality of health care by promoting the proper use of medications to treat pain and terminal illness, and to reduce duplicative prescribing and overprescribing of controlled substance practices.

(b) Such program shall be administered by the agency at the direction and oversight of the board. (Code 1981, § 16-13-57, enacted by Ga. L. 2011, p. 659, § 2/SB 36.)

16-13-58. Funds for development and maintenance of program; granting of funds to dispensers.

(a) The agency shall be authorized to apply for available grants and may accept any gifts, grants, donations, and other funds, including funds from the disposition of forfeited property, to assist in developing and maintaining the program established pursuant to Code Section 16-13-57; provided, however, that neither the board, agency, nor any other state entity shall accept a grant that requires as a condition of the grant any sharing of information that is inconsistent with this part.

(b) The agency shall be authorized to grant funds to dispensers for the purpose of covering costs for dedicated equipment and software for dispensers to use in complying with the reporting requirements of Code Section 16-13-59. Such grants to dispensers shall be funded by gifts, grants, donations, or other funds, including funds from the disposition of forfeited property, received by the agency for the operation of the program established pursuant to Code Section 16-13-57. The agency shall be authorized to establish standards and specifications for any equipment and software purchased pursuant to a grant received by a dispenser pursuant to this Code section. Nothing in this part shall be construed to require a dispenser to incur costs to purchase equipment or software to comply with this part.

(c) Nothing in this part shall be construed to require any appropriation of state funds. (Code 1981, § 16-13-58, enacted by Ga. L. 2011, p. 659, § 2/SB 36.)

16-13-59. Information to include for each Schedule II, III, IV, or V controlled substance prescription; compliance.

(a) For purposes of the program established pursuant to Code Section 16-13-57, each dispenser shall submit to the agency by elec-

tronic means information regarding each prescription dispensed for a Schedule II, III, IV, or V controlled substance. The information submitted for each prescription shall include at a minimum, but shall not be limited to:

- (1) DEA permit number or approved dispenser facility controlled substance identification number;
- (2) Date the prescription was dispensed;
- (3) Prescription serial number;
- (4) If the prescription is new or a refill;
- (5) National Drug Code (NDC) for drug dispensed;
- (6) Quantity and strength dispensed;
- (7) Number of days supply of the drug;
- (8) Patient's name;
- (9) Patient's address;
- (10) Patient's date of birth;
- (11) Patient gender;
- (12) Method of payment;
- (13) Approved prescriber identification number or prescriber's DEA permit number;
- (14) Date the prescription was issued by the prescriber; and
- (15) Other data elements consistent with standards established by the American Society for Automation in Pharmacy, if designated by regulations of the agency.

(b) Each dispenser shall submit the prescription information required in subsection (a) of this Code section in accordance with transmission methods and frequency requirements established by the agency on at least a weekly basis and shall report, at a minimum, such prescription information no later than ten days after the prescription is dispensed. If a dispenser is temporarily unable to comply with this subsection due to an equipment failure or other circumstances, such dispenser shall notify the board and agency.

(c) The agency may issue a waiver to a dispenser that is unable to submit prescription information by electronic means acceptable to the agency. Such waiver may permit the dispenser to submit prescription information to the agency by paper form or other means, provided all information required in subsection (a) of this Code section is submitted in this alternative format and in accordance with the frequency

requirements established pursuant to subsection (b) of this Code section. Requests for waivers shall be submitted in writing to the agency.

(d) The agency shall not revise the information required to be submitted by dispensers pursuant to subsection (a) of this Code section more frequently than annually. Any such change to the required information shall neither be effective nor applicable to dispensers until six months after the adoption of such changes.

(e) The agency shall not access or allow others to access any identifying prescription information from the electronic data base after one year from the date such information was originally received by the agency. The agency may retain aggregated prescription information for a period of one year from the date the information is received but shall promulgate regulations and procedures that will ensure that any identifying information the agency receives from any dispenser or reporting entity that is one year old or older is deleted or destroyed on an ongoing basis in a timely and secure manner.

(f) A dispenser may apply to the agency for an exemption to be excluded from compliance with this Code section if compliance would impose an undue hardship on such dispenser. The agency shall provide guidelines and criteria for what constitutes an undue hardship. (Code 1981, § 16-13-59, enacted by Ga. L. 2011, p. 659, § 2/SB 36.)

16-13-60. Privacy and confidentiality; use of data; security program.

(a) Except as otherwise provided in subsections (c) and (d) of this Code section, prescription information submitted pursuant to Code Section 16-13-59 shall be confidential and shall not be subject to open records requirements, as contained in Article 4 of Chapter 18 of Title 50.

(b) The agency, in conjunction with the board, shall establish and maintain strict procedures to ensure that the privacy and confidentiality of patients, prescribers, and patient and prescriber information collected, recorded, transmitted, and maintained pursuant to this part are protected. Such information shall not be disclosed to any person or entity except as specifically provided in this part and only in a manner which in no way conflicts with the requirements of the federal Health Insurance Portability and Accountability Act (HIPAA) of 1996, P.L. 104-191.

(c) The agency shall be authorized to provide requested prescription information collected pursuant to this part only as follows:

(1) To persons authorized to prescribe or dispense controlled substances for the sole purpose of providing medical or pharmaceutical care to a specific patient;

(2) Upon the request of a patient, prescriber, or dispenser about whom the prescription information requested concerns or upon the request on his or her behalf of his or her attorney;

(3) To local, state, or federal law enforcement or prosecutorial officials pursuant to the issuance of a search warrant pursuant to Article 2 of Chapter 5 of Title 17; and

(4) To the agency or the Georgia Composite Medical Board upon the issuance of an administrative subpoena issued by a Georgia state administrative law judge.

(d) The board may provide data to government entities for statistical, research, educational, or grant application purposes after removing information that could be used to identify prescribers or individual patients or persons who received prescriptions from dispensers.

(e) Any person or entity who receives electronic data base prescription information or related reports relating to this part from the agency shall not provide such information or reports to any other person or entity except by order of a court of competent jurisdiction pursuant to this part.

(f) Any permissible user identified in this part who directly accesses electronic data base prescription information shall implement and maintain a comprehensive information security program that contains administrative, technical, and physical safeguards that are substantially equivalent to the security measures of the agency. The permissible user shall identify reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of personal information that could result in the unauthorized disclosure, misuse, or other compromise of the information and shall assess the sufficiency of any safeguards in place to control the risks.

(g) No provision in this part shall be construed to modify, limit, diminish, or impliedly repeal any authority existing on June 30, 2011, of a licensing or regulatory board or any other entity so authorized to obtain prescription information from sources other than the data base maintained pursuant to this part; provided, however, that the agency shall be authorized to release information from the data base only in accordance with the provisions of this part. (Code 1981, § 16-13-60, enacted by Ga. L. 2011, p. 659, § 2/SB 36.)

16-13-61. Electronic Database Review Advisory Committee; members; terms; officers; procedure; compensation.

(a) There is established an Electronic Database Review Advisory Committee for the purposes of consulting with and advising the agency on matters related to the establishment, maintenance, and operation of

how prescriptions are electronically reviewed pursuant to this part. This shall include, but shall not be limited to, data collection, regulation of access to data, evaluation of data to identify benefits and outcomes of the reviews, communication to prescribers and dispensers as to the intent of the reviews and how to use the data base, and security of data collected.

(b) The advisory committee shall consist of ten members as follows:

- (1) A representative from the agency;
- (2) A representative from the Georgia Composite Medical Board;
- (3) A representative from the Georgia Board of Dentistry;
- (4) A representative with expertise in personal privacy matters, appointed by the president of the State Bar of Georgia;
- (5) A representative from a specialty profession that deals in addictive medicine, appointed by the Georgia Composite Medical Board;
- (6) A pain management specialist, appointed by the Georgia Composite Medical Board;
- (7) An oncologist, appointed by the Georgia Composite Medical Board;
- (8) A representative from a hospice or hospice organization, appointed by the Georgia Composite Medical Board;
- (9) A representative from the State Board of Optometry; and
- (10) The consumer member appointed by the Governor to the State Board of Pharmacy pursuant to subsection (b) of Code Section 26-4-21.

(c) Each member of the advisory committee shall serve a three-year term or until the appointment and qualification of such member's successor.

(d) The advisory committee shall elect a chairperson and vice chairperson from among its membership to serve a term of one year. The vice chairperson shall serve as the chairperson at times when the chairperson is absent.

(e) The advisory committee shall meet at the call of the chairperson or upon request by at least three of the members and shall meet at least one time per year. Five members of the committee shall constitute a quorum.

(f) The members shall receive no compensation or reimbursement of expenses from the state for their services as members of the advisory

committee. (Code 1981, § 16-13-61, enacted by Ga. L. 2011, p. 659, § 2/SB 36.)

16-13-62. Rules and regulations.

The agency shall establish rules and regulations to implement the requirements of this part. Nothing in this part shall be construed to authorize the agency to establish policies, rules, or regulations which limit, revise, or expand or purport to limit, revise, or expand any prescription or dispensing authority of any prescriber or dispenser subject to this part. Nothing in this part shall be construed to impede, impair, or limit a prescriber from prescribing pain medication in accordance with the pain management guidelines developed and adopted by the Georgia Composite Medical Board. (Code 1981, § 16-13-62, enacted by Ga. L. 2011, p. 659, § 2/SB 36.)

16-13-63. Liability.

Nothing in this part shall require a dispenser or prescriber to obtain information about a patient from the program established pursuant to this part. A dispenser or prescriber shall not have a duty and shall not be held civilly liable for damages to any person in any civil or administrative action or criminally responsible for injury, death, or loss to person or property on the basis that the dispenser or prescriber did or did not seek or obtain information from the electronic data base established pursuant to Code Section 16-13-57. (Code 1981, § 16-13-63, enacted by Ga. L. 2011, p. 659, § 2/SB 36.)

16-13-64. Violations; criminal penalties; civil damages.

(a) A dispenser who knowingly and intentionally fails to submit prescription information to the agency as required by this part or knowingly and intentionally submits incorrect prescription information shall be guilty of a felony and, upon conviction thereof, shall be punished for each such offense by imprisonment for not less than one year nor more than five years, a fine not to exceed \$50,000.00, or both, and such actions shall be reported to the licensing board responsible for issuing such dispenser's dispensing license for action to be taken against such dispenser's license.

(b) An individual authorized to access electronic data base prescription information pursuant to this part who negligently uses, releases, or discloses such information in a manner or for a purpose in violation of this part shall be guilty of a misdemeanor. Any person who is convicted of negligently using, releasing, or disclosing such information in violation of this part shall, upon the second or subsequent conviction, be

guilty of a felony and shall be punished by imprisonment for not less than one nor more than three years, a fine not to exceed \$5,000.00, or both.

(c)(1) An individual authorized to access electronic data base prescription information pursuant to this part who knowingly obtains or discloses such information in a manner or for a purpose in violation of this part shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one year nor more than five years, a fine not to exceed \$50,000.00, or both.

(2) Any person who knowingly obtains, attempts to obtain, or discloses electronic data base prescription information pursuant to this part under false pretenses shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one year nor more than five years, a fine not to exceed \$100,000.00, or both.

(3) Any person who obtains or discloses electronic data base prescription information not specifically authorized herein with the intent to sell, transfer, or use such information for commercial advantage, personal gain, or malicious harm shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than two years nor more than ten years, a fine not to exceed \$250,000.00, or both.

(d) Any person who is injured by reason of any violation of this part shall have a cause of action for the actual damages sustained and, where appropriate, punitive damages. Such person may also recover attorney's fees in the trial and appellate courts and the costs of investigation and litigation reasonably incurred.

(e) The penalties provided by this Code section are intended to be cumulative of other penalties which may be applicable and are not intended to repeal such other penalties. (Code 1981, § 16-13-64, enacted by Ga. L. 2011, p. 659, § 2/SB 36.)

16-13-65. Exceptions.

(a) This part shall not apply to any veterinarian.

(b) This part shall not apply to any drug, substance, or immediate precursor classified as an exempt over the counter (OTC) Schedule V controlled substance pursuant to this chapter or pursuant to board rules established in accordance with Code Section 16-13-29.2. (Code 1981, § 16-13-65, enacted by Ga. L. 2011, p. 659, § 2/SB 36.)

ARTICLE 3

DANGEROUS DRUGS

Cross references. — Disciplinary action for student of public educational institution convicted of controlled substance offense, § 20-1-23. Disciplinary action for student of nonpublic educational institu-

tion convicted of controlled substance abuse, § 20-1-24. Enforcement powers of director of Georgia Drugs and Narcotics Agency and drug agents under article generally, § 26-4-29.

JUDICIAL DECISIONS

Constitutionality. — O.C.G.A. Art. 3, Ch. 13, T. 16 is not unconstitutionally vague, nor does it constitute illegal delegation of legislative authority for failing to list or codify which drugs are dangerous.

Ward v. State, 248 Ga. 60, 281 S.E.2d 503 (1981).

Cited in Craig v. State, 130 Ga. App. 689, 204 S.E.2d 307 (1974).

OPINIONS OF THE ATTORNEY GENERAL

Enforcement of article. — Georgia State Board of Pharmacy lacks discretion to refrain from enforcing O.C.G.A. Art. 3, Ch. 13, T. 16. 1982 Op. Att'y Gen. No. 82-44.

Applicability to state and local agencies. — State and local agencies are subject to the requirements of the Georgia

Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., but are not subject to the requirements of the Dangerous Drug Act, O.C.G.A. § 16-13-70 et seq., since there is no definition of "person" specifically applicable to the Dangerous Drug Act. 1986 Op. Att'y Gen. No. 86-28.

RESEARCH REFERENCES

ALR. — Conviction of possession of illicit drugs found in premises of which defendant was in nonexclusive possession, 56 ALR3d 948.

Conviction of possession of illicit drugs found in automobile of which defendant was not sole occupant, 57 ALR3d 1319.

16-13-70. Short title.

This article shall be known and may be cited as the "Dangerous Drug Act." (Code 1933, § 79A-701, enacted by Ga. L. 1967, p. 296, § 1.)

16-13-70.1. Definition of terms.

Any term used in this article and not defined in this article but defined in Code Section 16-13-21 shall have the meaning provided for that term in Code Section 16-13-21. (Code 1981, § 16-13-70.1, enacted by Ga. L. 2001, p. 816, § 3.)

16-13-71. "Dangerous drug" defined.

(a) A "dangerous drug" means any drug other than a drug contained in any schedule of Article 2 of this chapter, which, under the Federal

Food, Drug, and Cosmetic Act (52 Stat. 1040 (1938)), 21 U.S.C. Section 301, et seq., as amended, may be dispensed only upon prescription. In any civil or criminal action or other proceedings, a certification from the Food and Drug Administration of the United States Department of Health and Human Services attesting to the fact that a drug other than a drug contained in any schedule of Article 2 of this chapter involved in the action or proceeding is a dangerous drug that federal law prohibits dispensing of without a prescription pursuant to the Federal Food, Drug, and Cosmetic Act shall be admissible as prima-facie proof that such drug is a “dangerous drug.”

(b) In addition to subsection (a) of this Code section, a “dangerous drug” means any other drug or substance declared by the General Assembly to be a dangerous drug; to include any of the following drugs, chemicals, or substances; salts, isomers, esters, ethers, or derivatives of such drugs, chemicals, or substances which have essentially the same pharmacological action; all other salts, isomers, esters, ethers, and compounds of such drugs, chemicals, or substances unless specifically exempted and the following devices, identified as “dangerous drugs”:

- (.03) Abacavir;
- (.035) Abarelix;
- (.037) Abatacept;
- (.04) Abciximab;
- (.043) abobotulinumtoxinA;
- (.045) Acamprostate;
- (.05) Acarbose;
- (.1) Acebutolol;
- (1) Acecarbromal;
- (2) Acenocoumarol;
- (3) Acetazolamide;
- (3.5) Reserved;
- (4) Acetohexamide;
- (4.1) Aceto-hydroxamic acid;
- (5) Acetophenazine;
- (6) Acetosulfone;
- (7) Acetyl sulfamethoxypyridazine;
- (8) Acetyl sulfisoxazole;

- (9) Acetylcarbromal;
- (10) Acetylcholine;
- (11) Acetylcysteine;
- (12) Acetyldigitoxin;
- (12.1) Acitretin;
- (13) Acrisorcin;
- (13.3) Acrivastine;
- (13.5) Acyclovir;
- (13.53) Adalimumab;
- (13.55) Adapalene;
- (13.6) Adenosine;
- (14) Adenosine 5-monophosphate;
- (15) Adenylic acid;
- (16) Adiphenine hydrochloride;
- (17) Adrenal cortex extracts;
- (17.5) Albendazole;
- (18) Albumin, normal human serum;
- (18.1) Albuterol;
- (19) Albutonium;
- (19.3) Alcaftadine;
- (19.5) Alclometasone dipropionate;
- (19.6) Alendronate;
- (19.65) Alfuzosin;
- (19.7) Alglucerase;
- (19.75) Alglucosidase alfa;
- (19.77) Aliskiren;
- (19.8) Alitretinoin;
- (20) Alkaverir;
- (21) Alkavervir;
- (21.1) Alkyl nitrites;
- (22) Allopurinol;

- (22.2) Almotriptan;
- (22.5) Alosetron;
- (23) Alpha amylase;
- (23.1) Alprostadil;
- (24) Alseroxylon;
- (24.1) Altenodol;
- (24.6) Altretamine;
- (25) Aluminum nicotinate;
- (26) Alverine;
- (26.5) Alvimopan;
- (27) Amantadine;
- (28) Ambenonium chloride;
- (28.5) Ambrisentan;
- (29) Ambrosiacaefollens;
- (30) Amcinonide;
- (30.1) Amdinocillin;
- (30.5) Amifostine;
- (31) Amikacin;
- (31.1) Amiloride;
- (32) Aminacrine;
- (33) 4-amino-N-methyl-pteroylglutamic acid;
- (34) Amino acid preparations for injection or vaginal use;
- (35) Aminocaproic acid;
- (36) Aminohippurate;
- (36.5) Aminolevulinic acid;
- (37) Aminophylline;
- (38) Aminosalicylate — See exceptions;
- (39) Aminosalicylate calcium — See exceptions;
- (40) Aminosalicylate potassium — See exceptions;
- (41) Aminosalicylate sodium — See exceptions;
- (42) Aminosalicylic acid — See exceptions;

- (42.1) Amiodarone;
- (43) Amisometradine;
- (44) Amitriptyline;
- (44.3) Amlexanox;
- (44.5) Amlodipine;
- (44.6) Ammonia, N-13;
- (44.7) Ammonium lactate;
- (45) Amodiaquin;
- (45.5) Amoxapine;
- (46) Amoxicillin;
- (47) Amphotericin B;
- (48) Ampicillin;
- (48.2) Amprenavir;
- (48.6) Amrinone;
- (49) Amyl nitrite;
- (50) Amylolytic enzymes;
- (50.1) Anabolic steroids, if listed in Code Section 16-13-27.1 as being exempt as Schedule III controlled substances;
- (50.3) Anagrelide;
- (50.4) Anakinra;
- (50.5) Anastrozole;
- (51) Androgens, except those androgens listed in paragraph (6) of Code Section 16-13-27;
- (52) Angiotensin amide;
- (52.5) Anidulafungin;
- (53) Anisindione;
- (54) Anisotropine;
- (55) Antazoline;
- (56) Anterior pituitary hormones;
- (57) Anthralin;
- (58) Anti-coagulant acid:

(A) Citrate dextrose;

(59) Antigens:

(A) *Alternaria tenuis*;

(B) Aqua ivy;

(C) Ash mix;

(D) *Aspergillus fumigatus*;

(E) Bacterial, *Staphylococcus aureus*, Type 1;

(F) Bacterial, *Staphylococcus aureus*, Type 3;

(G) Bacterial, Undenatured;

(H) Bee;

(I) Beech;

(J) Bermuda grass;

(K) Birch;

(L) California live oak;

(M) *Candida albicans*;

(N) Careless weed;

(O) Cat epithelia;

(P) Cattle epithelia;

(Q) *Coccidioides immitis*;

(R) Cottonwood fremont;

(S) Dog epithelia;

(T) Elm mix;

(U) English plantain;

(V) Feather mix;

(W) Gram negative bacterial;

(X) *Helminthosporium sativum*;

(Y) Hickory;

(Z) *Hormodendrum hordei*;

(AA) Hornet;

(BB) House dust;

(CC) House dust mix;

- (DD) Insects;
- (EE) Intradermal or scratching test;
- (FF) Johnson grass;
- (GG) Kentucky blue grass;
- (HH) Kochia;
- (II) Lamb quarters;
- (JJ) Maple;
- (KK) Mesquite;
- (LL) Mixed epidermals;
- (MM) Mixed grass, ragweeds (spring-fall);
- (NN) Mixed grasses (spring);
- (OO) Mixed inhalants;
- (PP) Mixed molds;
- (QQ) Mixed ragweed;
- (RR) Mixed ragweed — mixed weeds (fall);
- (SS) Mixed weeds;
- (TT) Molds;
- (UU) Mountain cedar;
- (VV) Mugwort common;
- (WW) National weed mix;
- (XX) Oak mix;
- (YY) Olive;
- (ZZ) Orchard grass;
- (AAA) Pecan;
- (BBB) *Penicillium notatum*;
- (CCC) Perennial rye;
- (DDD) Poison oak and poison ivy;
- (EEE) Pollens;
- (FFF) Poplar mix;
- (GGG) Prescription;
- (HHH) Ragweed mix;

- (III) Red top grass;
- (JJJ) Respiratory bacterial;
- (KKK) Rough pigweed;
- (LLL) Russian thistle;
- (MMM) Sagebrush common;
- (NNN) Scale mix;
- (OOO) Short ragweed;
- (PPP) Simplified allergy screening set;
- (QQQ) Skin bacterial;
- (RRR) Southern grass;
- (SSS) Staphylococcal;
- (TTT) Stinging insect mix;
- (UUU) Stinging insects;
- (VVV) Sweet vernal;
- (WWW) Sycamore;
- (XXX) Tall ragweed;
- (YYY) Timothy;
- (ZZZ) Tree mix;
- (AAAA) Trees (early spring);
- (BBBB) Walnut;
- (CCCC) Wasp;
- (DDDD) West ragweed;
- (EEEE) West weed mix;
- (FFFF) Yellow jacket;
- (60) Antihemophilic factor, Human;
- (61) Antirabies serum;
- (62) Antivenin;
- (62.1) Apomorphine;
- (62.3) Apraclonidine;
- (62.4) Aprepitant;
- (62.5) Aprotinin;

- (62.7) Ardeparin;
- (62.75) Arformoterol tartrate;
- (62.8) Argatroban;
- (63) Arginine, L-;
- (63.5) Aripiprazole;
- (64) Arsenic — Preparation for human use;
- (64.1) Arsenic trioxide;
- (65) Artegraft;
- (65.5) Artemether;
- (66) Ascorbate sodium — Injection;
- (66.5) Asenapine;
- (67) Asparaginase;
- (67.6) Astemizole;
- (67.67) Astenajavol;
- (67.72) Atazanavir;
- (68.1) Atenolol;
- (68.15) Atomoxetine;
- (68.2) Atorvastatin;
- (68.3) Atovaquone;
- (68.4) Atracurium besylate;
- (68.5) Atropine — See exceptions;
- (68.6) Auranofin;
- (69) Aurothioglucose;
- (69.5) Azacitidine;
- (70) Azapetine;
- (71) Azatadine maleate;
- (72) Azathioprine;
- (72.3) Azelaic acid;
- (72.4) Azelastine;
- (72.5) Azithromycin;
- (72.7) Azlocillin;

- (73) Azo-sulfisoxazole;
- (73.5) Aztreonam;
- (74) Azuresin;
- (75) Bacitracin — See exceptions;
- (76) Baclofen;
- (76.5) Balsalazide;
- (77) Barium — See exceptions;
- (78) Beclomethasone;
- (79) Belladonna;
- (80) Belladonna alkaloids;
- (81) Belladonna extracts;
- (82) Benactyzine;
- (82.5) Benazepril;
- (82.7) Bendamustine;
- (83) Bendroflumethiazide;
- (83.1) Benoxaprofen;
- (83.2) Bentiromide;
- (83.5) Bentoquatam — See exceptions;
- (84) Benzestrol;
- (85) Benzonatate;
- (86) Benzoylpas;
- (87) Benzquinamide;
- (88) Benzthiazide;
- (89) Benztropine;
- (90) Benzylpenicilloyl - polylysine;
- (91) Bephenium hydroxynaphthoate;
- (91.3) Bepotastine;
- (91.5) Bepridil;
- (91.7) Beractant;
- (91.8) Besifloxacin;
- (92) Beta-carotene — See exceptions;

- (93) Betadine vaginal gel;
- (94) Betahistine;
- (94.5) Betaine, anhydrous;
- (95) Betamethasone;
- (95.1) Betaxolol;
- (96) Betazole;
- (97) Bethanechol;
- (97.1) Bethanidine sulfate;
- (97.2) Bevacizumab;
- (97.3) Bexarotene;
- (97.5) Bicalutamide;
- (98) Bile extract;
- (98.2) Bimatoprost;
- (99) Biperiden;
- (100) Bisacodyl tannex;
- (101) Bishydroxycoumarin;
- (101.5) Biskalcitrate;
- (102) Bismuth sodium tartrate — See exceptions;
- (102.05) Bisoprolol;
- (102.1) Bitolterol mesylate;
- (102.5) Bivalirudin;
- (103) Blastomycine;
- (104) Bleomycin;
- (105) Boroglycerin glycerite;
- (105.3) Bortezomib;
- (105.5) Bosentan;
- (105.7) Botulinum toxin (B);
- (106) Botulism antitoxin;
- (107) Bretylium;
- (107.3) Briazolamide;
- (107.5) Brimonidine;

- (108) Bromelains — See exceptions;
- (108.5) Bromfenac;
- (109) Bromisovalum;
- (110) Bromocriptine;
- (111) Bromodiphenhydramine;
- (112) Brompheniramine — See exceptions;
- (113) Brucella antigen;
- (114) Brucella protein nucleate;
- (115) Buclizine;
- (115.3) Budesonide;
- (115.5) Bumetanide;
- (116) Bupivacaine;
- (116.05) Reserved;
- (116.1) Bupropion;
- (116.5) Buspirone;
- (117) Busulfan;
- (118) Butacaine;
- (119) Butaperazine;
- (119.05) Butenafine — See exceptions;
- (119.1) Butoconazole — See exceptions;
- (120) Reserved;
- (121) Butyl nitrite;
- (122) Butyrophenone;
- (122.3) Cabazitaxel;
- (122.5) Cabergoline;
- (123) Cadmium sulfide — See exceptions;
- (124) Caffeine sodium benzoate;
- (124.3) Calcifediol;
- (124.7) Calcipotriene;
- (125) Calcitonin, Salmon;
- (126) Calcitriol;

- (127) Calcium disodium edetate — See exceptions;
- (128) Calcium gluconogalactogluconate;
- (129) Calcium levulinate;
- (129.5) Calfactant;
- (130) Calusterone;
- (130.3) Canakinumab;
- (130.5) Candesartan;
- (131) Candicidin;
- (132) Cantharidin;
- (132.5) Capecitabine;
- (133) Capreomycin;
- (133.05) Capsaicin — see exceptions;
- (133.1) Captopril;
- (134) Capyodiamine;
- (135) Caramiphen;
- (136) Carbachol;
- (137) Carbamazepine;
- (138) Carbazochrome;
- (139) Carbenicillin;
- (140) Carbetapentane;
- (141) Carbidopa;
- (142) Carbinoxamine;
- (142.5) Carboplatin;
- (143) Carglumic Acid;
- (144) Carmustine;
- (144.1) Carnitine;
- (145) Carphenazine;
- (145.6) Carteolol;
- (145.8) Carvedilol;
- (146) Casein hydrolysate;
- (146.6) Caspofungin;

- (147) Catarrhalis combined vaccine;
- (148) Catarrhalis vaccine mixed;
- (149) Cefaclor;
- (150) Cefadroxil;
- (151) Cefamandole;
- (151.3) Cefazolin;
- (151.4) Cefdinir;
- (151.45) Cefditoren;
- (151.5) Cefepime;
- (151.6) Cefixime;
- (151.7) Cefmetazole;
- (151.8) Cefonicid;
- (152) Cefoperazone;
- (152.1) Ceforanide;
- (152.2) Cefotaxime;
- (152.3) Cefotetan;
- (152.7) Cefotiam;
- (152.9) Cefoxitin;
- (153.1) Cefpiramide;
- (153.2) Cefpodoxime;
- (153.3) Cefprozil;
- (153.35) Ceftaroline;
- (153.4) Ceftazidime;
- (153.5) Ceftibuten;
- (153.6) Ceftizoxime;
- (153.8) Ceftriaxone;
- (153.9) Cefuroxime;
- (153.95) Celecoxib;
- (154) Cellulose, Oxadized, Regenerated — See exceptions;
- (155) Cephalixin;
- (156) Cephaloglycin;

- (157) Cephaloridine;
- (158) Cephalothin;
- (159) Cephapirin;
- (159.3) Cephhradine;
- (159.6) Ceretec;
- (159.8) Cerivastatin;
- (160) Certolizumab;
- (160.1) Ceruletide;
- (160.15) Cetirizine — See exceptions;
- (160.16) Cetrorelix;
- (160.165) Cetuximab;
- (160.17) Cevimeline;
- (160.20) Chenodioli;
- (161) Chlophedianol;
- (162) Chlorambucil;
- (163) Chloramphenicol;
- (164) Chloranil — See exceptions;
- (165) Chlordantoin;
- (166) Chlordiazepoxide in combination with clidinium bromide or water soluble esterified estrogens;
- (166.5) Chlorhexidine — See exceptions;
- (167) Chlormadinone;
- (168) Chlormerodrin;
- (169) Chlormezanone;
- (170) Chloroacetic acid — See exceptions;
- (171) Chlorobutanol — See exceptions;
- (172) Chloroform — See exceptions;
- (173) Chloroguanide;
- (174) Chloroprocaine;
- (175) Chloroquine;
- (176) Chlorothiazide;

- (177) Chlorotrianisene;
- (178) Chloroxine;
- (179) Chlorphenesin;
- (180) Chlorpheniramine — See exceptions;
- (181) Chlorphenoxamine;
- (182) Chlorpromazine;
- (183) Chlorpropamide;
- (184) Chlorprothixene;
- (185) Chlorquinaldol;
- (186) Chlortetracycline;
- (187) Chlorthalidone;
- (188) Chlorzoxazone;
- (189) Cholera vaccine;
- (190) Cholestyramine resin;
- (191) Chondroitin;
- (191.5) Chymopapain;
- (192) Chymotrypsin;
- (192.02) Ciclesonide;
- (192.03) Ciclopirox;
- (192.05) Cidofovir;
- (192.1) Cilastatin;
- (192.4) Cilexetil;
- (192.7) Cilostazol;
- (193) Cimetidine — See exceptions;
- (193.5) Cinacalcet;
- (194) Cinoxacin;
- (194.5) Ciprofloxacin;
- (194.7) Cisapride;
- (194.8) Cisatracurium;
- (195) Cisplatin;
- (195.2) Citalopram;

- (195.3) Cladribine;
- (195.5) Clarithromycin;
- (195.7) Clavulanate;
- (196) Clemastine — See exceptions;
- (196.5) Clevidipine;
- (197) Clidinium bromide;
- (198) Clindamycin;
- (198.1) Clobetasol propionate;
- (199) Clocortolone pivalate;
- (200) Clofibrate;
- (201) Clomiphene;
- (201.5) Clomipramine;
- (202) Clonidine;
- (203) Clopidogrel;
- (204) Clostridiopeptidase;
- (205) Clotrimazole — See exceptions;
- (206) Cloxacillin;
- (206.5) Clozapine;
- (207) Coal tar solution topical;
- (208) Cobra venom;
- (209) Colchicine — See exceptions;
- (209.5) Colesevelam;
- (210) Colestipol;
- (211) Colistimethate;
- (212) Colistin;
- (213) Collagenase;
- (213.1) Collagenase clostridium histolyticum;
- (213.3) Conivaptan;
- (213.5) Corticorelin;
- (214) Corticotropin;
- (215) Corticotropin, Respository;

- (216) Cortisone;
- (217) Cosyntropin;
- (217.5) Crixivan;
- (218) Cromolyn — See exceptions;
- (219) Crotaline antivenin, Polyvalent;
- (220) Crotamiton;
- (221) Cryptenamine;
- (221.5) Cupric chloride — injectable;
- (222) Cyanide antidote;
- (223) Cyclacillin;
- (224) Cyclandelate;
- (225) Reserved;
- (226) Cyclobenzaprine;
- (227) Cyclomethycaine;
- (228) Cyclopentamine;
- (229) Cyclopentolate;
- (230) Cyclophosphamide;
- (231) Cycloserine;
- (231.5) Cyclosporine;
- (232) Cyclothiazide;
- (233) Cycrimine;
- (234) Cyproheptadine;
- (234.5) Cysteamine;
- (235) Cytarabine;
- (235.5) Dabigatran;
- (236) Dacarbazine;
- (236.6) Daclizumab;
- (237) Dactinomycin;
- (237.1) Dalfampridine;
- (237.2) Dalfopristin;
- (237.5) Dalteparin;

- (237.7) Danaparoid;
- (238) Danazol;
- (239) Dantrolene;
- (239.5) Dapiprazole;
- (240) Dapsone — See exceptions;
- (240.3) Daptomycin;
- (240.5) Darbepoetin alfa;
- (240.6) Darifenacin;
- (240.7) Darunavir;
- (240.9) Dasatinib;
- (241) Daunorubicin;
- (242) Deanol;
- (243) Decamethonium;
- (243.3) Decitabine;
- (243.5) Deferasirox;
- (244) Deferoxamine;
- (244.4) Degarelix;
- (244.5) Delavirdine;
- (245) Demecarium;
- (246) Demeclocycline;
- (247) Demethylchlortetracycline;
- (247.7) Denosumab;
- (248) Deoxyribonuclease, Pancreatic;
- (249) Deserpidine;
- (249.5) Desflurane;
- (250) Desipramine;
- (250.5) Desirudin;
- (251) Deslanoside;
- (251.5) Desloratadine;
- (252) Desmopressin;
- (252.5) Desogestrel;

- (253) Desonide;
- (254) Desoximetasone;
- (255) Desoxycorticosterone;
- (256) Desoxyribonuclease;
- (256.5) Desvenlafaxine;
- (257) Dexamethasone;
- (258) Dexbrompheniramine — See exceptions;
- (259) Dexchlorpheniramine;
- (259.5) Dexlansoprazole;
- (260) Dexpanthenol;
- (260.5) Dexrazoxane;
- (261) Dextran;
- (262) Reserved;
- (263) Dextriferron;
- (264) Dextroisoephedrine;
- (265) Dextrothyroxine;
- (265.5) Dezocine;
- (266) Diatrizoate;
- (267) Diazoxide;
- (268) Dibucaine;
- (269) Dichloralphenazone;
- (270) Dichlorphenamide;
- (270.5) Diclofenac;
- (271) Dicloxacillin;
- (272) Dicyclomine;
- (272.5) Didanosine;
- (273) Dienestrol;
- (273.5) Dienogest;
- (274) Diethylcarbamazine;
- (275) Diethylstilbestrol;
- (276) Reserved;

- (277) Diflorasone diacetate;
- (277.5) Diflunisal;
- (277.57) Difluprednate;
- (278) Digitalis;
- (279) Digitoxin;
- (280) Digoxin;
- (281) Dihydroergocornine;
- (282) Dihydroergocristine;
- (283) Dihydroergocryptine;
- (284) Dihydroergotamine;
- (285) Dihydrostreptomycin;
- (286) Dihydrotachysterol;
- (287) Diiodohydroxyquin;
- (287.5) Diltiazem;
- (288) Dimenhydrinate — Injection or suppositories;
- (289) Dimercaprol;
- (290) Dimethindene;
- (291) Dimethisterone;
- (292) Dimethyl sulfoxide — See exceptions;
- (293) Dimethyl tubocurarine;
- (293.5) Dimyristoyl;
- (294) Dinoprost;
- (295) Dinoprostone;
- (296) Dioxyline;
- (297) Diphemanil;
- (298) Diphenadione;
- (299) Diphenhydramine — See exceptions;
- (300) Diphenidol;
- (301) Diphenylhydantoin;
- (302) Diphenylpyraline;
- (303) Diphtheria antitoxin;

- (304) Diphtheria and tetanus toxoids;
- (305) Diphtheria and tetanus toxoids and pertussis vaccine;
- (306) Diphtheria and tetanus toxoids, Absorbed;
- (307) Diphtheria and tetanus toxoids, Pertussis;
- (308) Diphtheria toxoid;
- (309) Dipivefrin;
- (310) Dipyridamole;
- (311) Dipyrone;
- (311.3) Dirithromycin;
- (311.5) Disibind;
- (312) Disodium edetate — See exceptions;
- (313) Disopyramide;
- (314) Disulfiram;
- (314.5) Divalproex;
- (315) Dobutamine;
- (315.5) Docetaxel;
- (315.7) Docosanol — See exceptions;
- (316) Doderlein bacilli;
- (316.2) Dofetilide;
- (316.3) Dolasetron;
- (316.5) Donepezil;
- (317) Dopamine;
- (317.2) Doripenem;
- (317.3) Dornase Alpha;
- (317.4) Dorzolamide;
- (317.5) Doxacurium;
- (318) Doxapram;
- (318.5) Doxazosin mesylate;
- (319) Doxepin;
- (319.5) Doxercalciferol;
- (320) Doxorubicin;

- (321) Doxycycline;
- (322) Doxylamine;
- (323) Doxylamine succinate;
- (324) Dromostanolone;
- (324.5) Dronedarone;
- (325) Droperidol;
- (325.3) Drospirenone;
- (325.4) Drotrecogin alfa;
- (325.45) Duloxetine;
- (325.5) Dutasteride;
- (326) Dyclonine;
- (327) Dydrogesterone;
- (328) Dyphylline;
- (328.5) Ecallantide;
- (329) Echothiophate;
- (329.5) Econazole;
- (330) Ectylurea;
- (330.3) Eculizumab;
- (330.5) Edetate — See exceptions;
- (331) Edrophonium;
- (331.03) Efavirenz;
- (331.05) Eflornithine;
- (331.06) Eltrombopag;
- (331.07) Emedastine;
- (331.072) Emtricitabine;
- (331.1) Enalapril;
- (331.6) Enalaprilat;
- (332) Enflurane;
- (332.2) Enfuvirtide;
- (332.5) Enoxacin;
- (332.7) Enoxaparin;

- (332.8) Entacapone;
- (332.85) Entecavir;
- (332.9) Epinastine;
- (333) Epinephrine;
- (334) Epinephryl borate;
- (334.3) Epirubicin;
- (334.4) Eplerenone;
- (334.5) Epoprostenol;
- (334.7) Eprosartan;
- (334.8) Eptifibatide;
- (335) Ergocalciferol — See exceptions;
- (335.5) Ergoloid mesylates;
- (336) Ergonovine;
- (337) Ergotamine;
- (338) Ergosine;
- (339) Ergocristine;
- (340) Ergocryptine;
- (341) Ergocornine;
- (342) Ergotaminine;
- (343) Ergosinine;
- (344) Ergocristinine;
- (345) Ergocryptinine;
- (346) Ergocorninine;
- (346.05) Eribulin;
- (346.1) Erlotinib;
- (346.5) Ertapenem;
- (347) Erythrityl tetranitrate;
- (348) Erythromycin;
- (348.722) Escitalopram;
- (349) Eserine;
- (349.4) Esmolol;

- (349.7) Esomeprazole;
- (350) Esterified estrogens;
- (351) Estradiol;
- (352) Estriol;
- (353) Estrogens;
- (354) Estrogenic substances;
- (355) Estrone;
- (355.5) Estropipate;
- (356) Ethacrynate;
- (357) Ethacrynic acid;
- (358) Ethambutol;
- (359) Ethamivan;
- (359.5) Ethanolamine oleate;
- (360) Ethaverine;
- (361) Ether — See exceptions;
- (361.5) Ethinamate;
- (362) Ethinyl estradiol;
- (363) Ethiodized oil;
- (364) Ethionamide;
- (365) Ethisterone;
- (366) Ethoheptazine;
- (367) Ethopropazine;
- (368) Ethosuximide;
- (369) Ethotoin;
- (370) Ethoxazene — See exceptions;
- (371) Ethoxyzolamide;
- (372) Ethyl biscoumacetate;
- (373) Ethyl chloride — See exceptions;
- (374) Ethyl nitrite spirit;
- (375) Reserved;
- (376) Ethylnorepinephrine;

- (377) Ethynodiol diacetate;
- (378) Etidocaine;
- (379) Etidronate;
- (379.05) Etodolac;
- (379.07) Etomidate;
- (379.09) Etonogestrel;
- (379.1) Etoposide;
- (379.5) Etravirine;
- (380) Eucatropine;
- (380.3) Everolimus;
- (380.5) Exemestane;
- (380.6) Exenatide;
- (380.7) Ezetimibe;
- (381) Factor IX complex, Human;
- (381.1) Famciclovir;
- (381.2) Famotidine — See exceptions;
- (381.3) Felbamate;
- (381.5) Felodipine;
- (381.55) Fenfibrate;
- (381.6) Fenofenadine;
- (381.7) Fenofibrate;
- (381.75) Fenofibric acid;
- (381.8) Fenoldopam;
- (382) Fenoprofen;
- (382.25) Febuxostat;
- (383) Ferric cacodylate;
- (383.15) Ferric Hexacyanoferrate;
- (383.3) Ferumoxides;
- (383.4) Ferumoxsil;
- (383.43) Ferumoxytol;
- (383.45) Fesoterodine;

- (383.5) Fexofenadine — See exceptions;
- (384) Fibrinogen;
- (385) Fibrinogen/antihemophilic factor, Human;
- (386) Fibrinolysin, Human;
- (386.3) Finasteride;
- (386.5) Filgrastin;
- (386.7) Fingolimod;
- (387) Flavoxate;
- (387.1) Flecainide acetate;
- (388) Florantyrone;
- (388.5) Flosequinan;
- (389) Floxuridine;
- (389.5) Fluconazole;
- (390) Flucytosine;
- (390.5) Fludarabine;
- (390.7) Fludeoxyglucose;
- (391) Fludrocortisone;
- (391.5) Flumazenil;
- (392) Flumethasone;
- (392.1) Flunisolide;
- (393) Fluocinonide;
- (394) Fluocinolone;
- (395) Fluorescein;
- (396) Fluoride — See exceptions;
- (396.5) Fluorometholone;
- (397) Fluorophosphates;
- (398) Fluorouracil;
- (399) Fluoxetine;
- (399.5) Fluoxymesterone;
- (400) Fluphenazine;
- (401) Fluprednisolone;

- (402) Flurandrenolide;
- (402.2) Flurbiprofen;
- (402.5) Flutamide;
- (402.7) Fluticasone;
- (402.8) Fluvastatin;
- (402.9) Fluvoxamine;
- (403) Folate sodium;
- (404) Folic acid — See exceptions;
- (404.3) Follitropin;
- (404.5) Fomivirsen;
- (404.7) Fondaparinux;
- (405) Foreign protein;
- (406) Formaldehyde — See exceptions;
- (406.2) Formoterol;
- (406.3) Fosamprenavir;
- (406.35) Fosaprepitant;
- (406.4) Foscarnet;
- (406.5) Fosfomycin;
- (406.7) Fosinopril;
- (406.9) Fosphenytoin;
- (406.95) Frovatriptan;
- (407) Furazolidone;
- (408) Furosemide;
- (408.2) Gabapentin;
- (408.25) Gadobenate;
- (408.3) Gadodiamide;
- (408.35) Gadofosveset;
- (408.4) Gadopentetate dimeglumine;
- (408.6) Gadoteridol;
- (408.8) Gadoversetamide;
- (408.85) Gadoxetate;

- (408.9) Galantamine;
- (409) Gallamine triethiodide;
- (409.3) Gallium citrate;
- (409.5) Gallium nitrate;
- (409.8) Galsulfase;
- (410) Gamma benzene hexachloride;
- (411) Gamma globulin;
- (411.5) Ganciclovir;
- (411.7) Ganirelix;
- (412) Gas gangrene polyvalent antitoxin;
- (412.03) Gatifloxacin;
- (412.04) Gefitinib;
- (412.05) Gemcitabine;
- (412.1) Gemfibrozil;
- (412.2) Gemifloxacin;
- (412.3) Gemtuzumab ozogamicin;
- (412.5) Genotropin;
- (413) Gentamicin;
- (414) Gentian violet vaginal suppositories;
- (415) Gitalin;
- (415.03) Glatiramer;
- (415.05) Glimepiride;
- (415.1) Glipizide;
- (416) Glucagon;
- (417) Gluceptate;
- (418) Gluconate magnesium;
- (419) Gluconate potassium — See exceptions;
- (420) Glutamate arginine;
- (420.1) Glyburide;
- (420.5) Glycine — See exceptions;
- (421) Glycobiarsol;

- (422) Glycopyrrolate;
- (423) Gold sodium thiomalate;
- (424) Gold thiosulfate — See exceptions;
- (424.4) Golimumab;
- (425) Gomenol Solution;
- (425.5) Gonadorelin acetate;
- (426) Gonadotropin, Chroinic;
- (427) Gonadotropin, Chroinic, Anti-human serum;
- (428) Gonadotropin, Serum;
- (428.5) Goserelin;
- (429) Gramicidin;
- (430) Gramineae pollens;
- (430.3) Gramosetron;
- (430.5) Granisetron;
- (431) Griseofulvin;
- (431.5) Guanabenz;
- (432) Guanethidine;
- (432.4) Guanadrel;
- (432.7) Guanfacine;
- (432.9) Guanidine;
- (433) Halcinonide;
- (433.5) Halobetasol Propionate;
- (433.7) Halofantrine;
- (434) Haloperidol;
- (435) Haloprogin;
- (436) Halothane;
- (437) Hartman's solution;
- (438) Heparin;
- (439) Hetacillin;
- (440) Hexachlorophene — See exceptions;
- (441) Hexafluorenium;

- (442) Hexocyclium;
- (443) Hexylcaine;
- (444) Histamine;
- (445) Histoplasmin;
- (445.5) Histrelin acetate;
- (446) Homatropine;
- (446.4) Human secretin;
- (446.6) Hyaluronan;
- (446.7) Hyaluronic acid;
- (447) Hyaluronidase;
- (448) Hydralazine;
- (449) Hydrocalciferol;
- (450) Hydrochlorothiazide;
- (451) Hydrocortamate;
- (452) Hydrocortisone — See exceptions;
- (453) Hydroflumethiazide;
- (454) Hydroquinone;
- (455) Hydroxocobalamin — See exceptions;
- (456) Hydroxyamphetamine;
- (457) Hydroxychloroquine;
- (458) Hydroxyprogesterone;
- (459) Hydroxyurea;
- (460) Hydroxyzine;
- (461) Hyoscyamine;
- (462) Hyoscyamus alkaloids;
- (463) Hypophamine;
- (463.03) Ibandronate;
- (464) Ibuprofen — See exceptions;
- (464.05) Ibutilide;
- (464.1) Idarubicin;
- (464.3) Idoxuridine;

- (464.5) Idursulfase;
- (464.6) Ifosfamide;
- (464.67) Iloperidone;
- (464.7) Iloprost;
- (464.8) Imatinib;
- (465) Imiglucerase;
- (465.1) Imipenem/cilastatin;
- (466) Imipramine;
- (466.5) Imiquimod;
- (467) Immune hepatitis B globulin, Human;
- (468) Immune poliomyelitis globulin, Human;
- (469) Immune serum globulin, Human;
- (469.05) IncobotulinumtoxinA;
- (469.1) Indapamide;
- (469.5) Indecainide;
- (470) Indigotindisulfonate;
- (470.05) Indinavir;
- (470.1) Indium IN-III oxyquinolone;
- (470.3) Indium IN-III pentetreotide;
- (471) Indocyanine green;
- (472) Indomethacin;
- (472.5) Infliximab;
- (473) Influenza virus vaccines;
- (474) Injections, All substances for human use — See exceptions;
- (474.2) Insulin aspart;
- (474.4) Insulin glargine;
- (474.45) Insulin glulisine;
- (474.5) Interferon;
- (475) Intrinsic factor concentrate manufactured for human use;
- (475.3) Inulin;
- (475.5) Iobenguane;

- (476) Iocetamic acid;
- (477) Iodamide;
- (478) Iodinated I-125 serum albumin;
- (479) Iodinated I-131 serum albumin;
- (480) Iodinated glycerol-theophylline;
- (481) Iodine solution, Strong oral;
- (482) Iodipamide;
- (482.5) Iodixanol;
- (483) Iodized oil;
- (484) Iodobenzoic acid — See exceptions;
- (485) Iodobrassid;
- (485.1) Iodohippurate sodium;
- (486) Iodopyracet;
- (487) Iodothiouracil;
- (487.05) Iofetamine;
- (487.08) Iohexol;
- (487.1) Iopamidol;
- (488) Iopanoic acid — See exceptions;
- (489) Iophendylate;
- (489.1) Iopromide;
- (489.2) Iothalamate;
- (489.3) Iothiouracil;
- (489.5) Iotrolan;
- (489.6) Ioversol;
- (490.1) Ioxaglate;
- (490.5) Ioxilan;
- (491) Ipodate;
- (491.5) Ipratropium;
- (491.6) Irbesartan;
- (491.7) Irinotecan;
- (492) Iron cacodylate;

- (493) Iron dextran injection;
- (494) Iron peptonized;
- (495) Iron sorbitex;
- (496) Isocarboxazid;
- (497) Isoetharine;
- (498) Isoflurane;
- (499) Isoflurophate;
- (500) Isometheptene;
- (501) Isoniazid;
- (502) Isopropamide;
- (503) Isoproterenol;
- (504) Isosorbide dinitrate;
- (504.05) Isosorbide mononitrate;
- (504.1) Isosulfan blue;
- (505) Isothipendyl;
- (505.5) Isotretinoin;
- (506) Isoxsuprine;
- (506.5) Isradipine;
- (506.7) Itraconazole;
- (506.8) Ivermectin;
- (506.9) Ixabepilone;
- (507) Kanamycin;
- (508) Reserved;
- (509) Ketocholanic acids;
- (509.1) Ketoconazole — See exceptions;
- (509.15) Ketoprofen — See exceptions;
- (509.17) Ketorolac tromethamine;
- (509.18) Ketotifen — See exceptions;
- (509.2) Labetalol;
- (509.7) Lacosamide;
- (510) Lactated ringers solution;

- (511) Lactulose;
- (511.3) Lamivudine;
- (511.5) Lamotrigine;
- (512) Lanatoside C;
- (512.3) Lanreotide;
- (512.5) Lansoprazole — see exceptions;
- (512.6) Lanthanum;
- (512.67) Lapatinib;
- (512.7) Latanoprost;
- (513) Latrodectus mactans;
- (513.5) Leflunomide;
- (513.7) Lenalidomide;
- (513.8) Letrozole;
- (514) Leucovorin;
- (514.1) Leuprolide;
- (514.5) Levalbuterol;
- (515) Reserved;
- (515.5) Levamisole;
- (516) Levarterenol;
- (516.05) Levetiracetam;
- (516.07) Levobetaxolol;
- (516.1) Levobunolol;
- (516.3) Levobupivacine;
- (516.5) Levocabastine;
- (516.7) Levocarnitine;
- (516.75) Levocetirizine;
- (517) Levodopa;
- (517.2) Levofloxacin;
- (517.25) Levoleucovorin;
- (517.3) Levomethadyl;
- (517.4) Levonordefrin;

- (518) Levopropoxyphene;
- (519) Levothyroxine;
- (520) Lidocaine — See exceptions;
- (521) Lincomycin;
- (522) Lindane — See exceptions;
- (522.5) Linezolid;
- (523) Linolenic acid;
- (524) Liothyronine;
- (525) Liotrix;
- (525.2) Liraglutide;
- (525.5) Lisinopril;
- (526) Lithium carbonate — See exceptions;
- (527) Lithium citrate;
- (528) Liver extract;
- (528.3) Lodoxamide;
- (528.5) Lomefloxacin;
- (529) Lomustine;
- (529.1) Loperamide — See exceptions;
- (529.5) Lopinavir;
- (529.7) Loracarbef;
- (529.9) Loratadine — See exceptions;
- (529.95) Losartan;
- (529.97) Loteprednol;
- (530) Lovastatin;
- (530.5) Loxapine;
- (530.7) Lubiprostone;
- (531) Lugols solution;
- (531.5) Lumefantrine;
- (531.7) Lurasidone;
- (532) Lututrin;
- (533) Lymphogranuloma venereum antigen;

- (534) Lypressin synthetic;
- (535) Mafenide;
- (536) Magnesium gluconate — See exceptions;
- (537) Magnesium salicylate;
- (538) Mandelic acid — See exceptions;
- (539) Mannitol — See exceptions;
- (540) Mannitol hexanitrate;
- (540.1) Maprotiline;
- (540.3) Maraviroc;
- (540.5) Masoprocol;
- (541) Measles immune globulin, Human;
- (542) Measles virus vaccines;
- (543) Mebendazole for human use;
- (544) Mecamylamine;
- (544.5) Mecasermin;
- (545) Mechlorethamine;
- (546) Meclizine — See exceptions;
- (546.5) Meclocycline;
- (547) Meclofenamate;
- (548) Medroxyprogesterone;
- (549) Medrysone;
- (550) Mefenamic acid;
- (550.5) Mefloquine;
- (551) Megestrol;
- (552) Meglumine;
- (552.5) Meloxicam;
- (553) Melphalan;
- (553.5) Memantine;
- (554) Menadiol;
- (555) Menadione;
- (556) Meningococcal polysaccharide vaccine;

- (557) Menotropins;
- (558) Mepenzolate;
- (559) Mephenesin;
- (560) Mephentermine;
- (561) Mephenytoin;
- (562) Meprednisone;
- (563) Mepivacaine;
- (563.5) Mequinol;
- (564) Meralluride;
- (565) Mercaptomerin;
- (566) Mercaptopurine;
- (567) Mercury bichloride — See exceptions;
- (567.1) Meropenem;
- (567.2) Mersalyl;
- (567.3) Mesalamine;
- (567.5) Mesna;
- (568) Mesoridazine;
- (569) Mestranol;
- (570) Metaproterenol;
- (571) Metaraminol;
- (572) Metaxalone;
- (572.5) Metformin;
- (573) Methacholine;
- (574) Methacycline;
- (575) Methallenestril;
- (576) Reserved;
- (577) Reserved;
- (578) Methantheline;
- (579) Methazolamide;
- (580) Methdilazine;
- (581) Methenamine hippurate;

- (582) Methenamine mandelate;
- (583) Methenamine sulfosalicylate;
- (584) Methicillin;
- (585) Methimazole;
- (586) Methiodal;
- (587) Methionine;
- (588) Methixene;
- (589) Methocarbamol;
- (590) Methotrexate;
- (591) Methotrimепrazine;
- (592) Methoxamine;
- (593) Methoxsalen;
- (594) Methoxyflurane;
- (595) Methoxyphenamine;
- (595.5) Methoxy polyethylene glycol-epoetin beta;
- (596) Methscopolamine;
- (597) Methsuximide;
- (598) Methyclothiazide;
- (599) Methylandrostenediol;
- (600) Methylatropine;
- (601) Methyldopa;
- (602) Methyldopate;
- (603) Methylene blue, Oral;
- (604) Methylergonovine;
- (604.5) Methylnaltrexone;
- (605) Methylprednisolone;
- (606) Reserved;
- (607) Methysergide;
- (608) Metoclopramide;
- (609) Metocurine iodide injection;
- (610) Metolazone;

- (611) Metoprolol;
- (612) Metrizamide;
- (612.5) Metrizoate;
- (613) Metronidazole;
- (614) Metyrapone;
- (615) Metyrosine;
- (615.01) Mexiletine;
- (615.1) Mezlocillin;
- (615.6) Mibefradil;
- (615.9) Micafungin;
- (616) Miconazole — See exceptions;
- (617) Microfibrillar collagen hemostat;
- (617.1) Midodrine;
- (617.22) Midubosathol;
- (617.3) Mifepristone;
- (617.4) Miglitol;
- (617.44) Miglustat;
- (617.47) Milnacipran;
- (617.5) Milrinone;
- (618) Minocycline;
- (619) Minoxidil — See exceptions;
- (619.3) Mirtazapine;
- (619.5) Misoprostol;
- (620) Mithramycin;
- (621) Mitomycin;
- (622) Mitotane;
- (622.3) Mitoxantrone;
- (622.5) Mivacurium;
- (622.7) Moexipril;
- (623) Molindone;
- (623.5) Mometasone;

- (624) Monobenzene;
- (624.1) Monooctanoin;
- (624.5) Montelukast;
- (624.7) Moricizine;
- (625) Morrhuate;
- (625.1) Moxalactam;
- (625.3) Moxidectin;
- (625.5) Moxifloxacin;
- (626) Mumps virus vaccines;
- (626.5) Mupirocin;
- (627) Mushroom spores which, when mature, contain either psilocybin or psilocin;
- (627.5) Mycophenolate;
- (628) N-acetyl-L-cysteine;
- (629) N. catarrhalis antigen;
- (629.5) Nabumetone;
- (630) Nadolol;
- (630.5) Nafarelin;
- (631) Nafcillin;
- (631.5) Naftifine;
- (632) Nalbuphine;
- (633) Reserved;
- (634) Nalidixic acid;
- (634.5) Nalmefene;
- (635) Naloxone;
- (635.1) Naltrexone;
- (636) Reserved;
- (637) Naphazoline — See exceptions;
- (638) Naproxen — See exceptions;
- (638.3) Naratriptan;
- (638.4) Natalizumab;

- (638.45) Nebivolol;
- (638.5) Nedocromil;
- (638.7) Nefazodone;
- (638.75) Nelarabine;
- (638.8) Nelfinavir;
- (639) Neomycin — See exceptions;
- (640) Neostigmine;
- (640.1) Nepafenac;
- (640.2) Nesiritide;
- (640.3) Netilmicin;
- (640.4) Nevirapine;
- (640.5) Niacinamide — See exceptions;
- (640.7) Nicardipine;
- (640.8) Niclosamide;
- (641.1) Nicotine resin complex (polacrilex) — See exceptions;
- (641.15) Nicotine transdermal system — See exceptions;
- (642) Nicotiny alcohol;
- (642.1) Nifedipine;
- (643) Nifuroximine;
- (644) Nikethamide;
- (644.3) Nilotinib;
- (644.4) Nilutamide;
- (644.5) Nimodipine;
- (644.7) Nisoldipine;
- (644.72) Nitazoxanide;
- (644.8) Nitisinone;
- (644.9) Nitric oxide — for use in humans;
- (645) Nitrofurantoin;
- (646) Nitrofurazone;
- (647) Nitroglycerin;
- (648) Nitroprusside — See exceptions;

- (648.3) Nitrous oxide — See exceptions;
- (648.6) Nizatidine — See exceptions;
- (649.1) Nomifensine maleate;
- (650) Nonoxynol — See exceptions;
- (651) Norepinephrine;
- (652) Norethindrone;
- (653) Norethynodrel;
- (653.5) Norfloxacin;
- (654) Norgestrel;
- (655) Normal serum albumin, Human;
- (656) Nortriptyline;
- (657) Nositol;
- (658) Novobiocin;
- (659) Nux vomica;
- (660) Nylidrin;
- (661) Nystatin;
- (661.5) Octreotide acetate;
- (661.6) Ofatumumab;
- (661.7) Ofloxacin;
- (661.8) Olanzapine;
- (662) Old tuberculin;
- (663) Oleandomycin;
- (663.1) Olmesartan;
- (663.2) Olopatadine;
- (663.3) Olsalazine Sodium;
- (663.4) Omega-3-acid;
- (663.5) Omeprazole — See exceptions;
- (663.7) Ondansetron;
- (663.75) Orlistat — See exceptions;
- (664) Orphenadrine;
- (665) Orthiodobenzoic acid;

- (665.5) Oseltamivir;
- (665.7) Ovine hyaluronidase;
- (666) Oxacillin;
- (666.4) Oxaliplatin;
- (666.6) Oxamniquine;
- (667) Oxaprozin;
- (667.5) Oxcarbazepine;
- (668) Oxethazaine;
- (668.5) Oxiconazole;
- (669) Oxolinic acid;
- (669.1) Oxprenolol;
- (670) Oxtriphylline;
- (671) Oxybutynin;
- (672) Oxygen for human use — See exceptions;
- (673) Reserved;
- (674) Oxyphenbutazone;
- (675) Oxyphencyclimine;
- (676) Oxyphenisatin;
- (677) Oxyphenonium;
- (678) Oxyquinoline;
- (679) Oxytetracycline;
- (680) Oxytocin;
- (680.5) Ozogamicin;
- (681) P-nitrosulfathiazole;
- (681.3) Paclitaxel;
- (681.4) Palifermin;
- (681.45) Paliperidone;
- (681.5) Palonosetron;
- (681.7) Pamidronate;
- (682) Pancreatin dornase;
- (683) Pancreatic enzyme;

- (684) Pancrelipase;
- (685) Pancuronium;
- (685.5) Panidronate;
- (685.6) Panitumumab;
- (685.7) Pantoprazole;
- (686) Papaverine;
- (687) Paramethadione;
- (688) Paramethasone;
- (689) Paranitrosulfathiazole;
- (690) Parathyroid injection;
- (691) Pargyline;
- (691.5) Paricalcitol;
- (692) Paromomycin;
- (692.2) Paroxetine;
- (692.3) Pazopanib;
- (692.4) Pegademase bovine;
- (692.5) Pegaspargase;
- (692.51) Pegfilgrastin;
- (692.515) Peginterferon;
- (692.517) Pegloticase;
- (692.52) Pegvisomant;
- (692.54) Pemetrexed;
- (692.55) Pemirolast;
- (692.6) Penbutolol;
- (692.8) Penciclovir;
- (693) Penicillamine;
- (694) Penicillin;
- (695) Penicillin G;
- (696) Penicillin O;
- (697) Penicillin V;
- (698) Penicillinase;

- (699) Pentaerythritol tetranitrate;
- (700) Pentagastrin;
- (700.1) Pentamidine isethionate;
- (701) Pentapiperide;
- (701.5) Pentetate calcium trisodium;
- (701.7) Pentetate zinc trisodium;
- (702) Penthienate;
- (703) Pentolinium;
- (703.03) Pentosan;
- (703.05) Pentostatin;
- (703.1) Pentoxifylline;
- (703.4) Pentylenetetrazol;
- (703.45) Perflexane;
- (703.5) Perflubron;
- (703.6) Perfluoroalkylpolyether;
- (703.65) Perflutren;
- (703.7) Pergolide;
- (704) Perindopril;
- (704.1) Permethrin — See exceptions;
- (705) Perphenazine;
- (706) Pertussis immune globulin, Human;
- (707) Phenacemide;
- (708) Phenaglycodol;
- (709) Phenaphthazine;
- (710) Phenazopyridine — See exceptions;
- (711) Phenelzine;
- (712) Phenethicillin;
- (713) Phenformin;
- (714) Phenindamine;
- (715) Phenindione;
- (716) Pheniramine — See exceptions;

- (717) Phenitramin;
- (718) Phenothiazine derivatives;
- (719) Phenoxybenzamine;
- (720) Phenoxymethyl penicillin;
- (721) Phenuprocoumon;
- (722) Phensuximide;
- (723) Phentolamine;
- (724) Phenylbutazone;
- (725) Phenylmercuric acetate;
- (726) Phenylmercuric nitrate;
- (726.5) Phenylpropanolamine;
- (727) Phenyltoloxamine dihydrogen citrate;
- (727.2) Phenytoin;
- (728) Phthalylsulfacetamide;
- (729) Phthalylsulfathiazole;
- (730) Physostigmine;
- (731) Phytonadione;
- (731.1) Pimozide;
- (732) Pilocarpine;
- (732.3) Pinacidil;
- (732.7) Pindolol;
- (732.8) Pioglitazone;
- (732.9) Pimecrolimus;
- (733) Pipazethate;
- (733.5) Pipecuronium;
- (734) Pipenzolate;
- (735) Piperacetazine;
- (735.1) Piperacillin;
- (736) Piperazine;
- (737) Piperidolate;
- (738) Piperocaine;

- (739) Pipobraman;
- (740) Pipradrol;
- (740.05) Pirbuterol;
- (740.1) Piroxicam;
- (740.5) Pitavastatin;
- (741) Plague vaccine;
- (742) Plasma protein fraction;
- (742.3) Plerixafor;
- (742.5) Plicamycin;
- (743) Pneumococcal polyvalent vaccine;
- (743.3) Podofilox;
- (743.5) Podophyllotoxin;
- (744) Poison ivy extract;
- (745) Poison ivy oak extract;
- (746) Poison ivy oak, sumac extract;
- (747) Poldine methysulfate;
- (747.4) Polidocanol;
- (748) Poliomyelitis vaccine;
- (749) Poliovirus vaccine, Live, Oral, All;
- (750) Polyestradiol;
- (751) Polymyxin B — See exceptions;
- (751.5) Polytetrafluoroethylene;
- (752) Polythiazide;
- (752.2) Poractant alfa;
- (752.5) Porfimer;
- (752.7) Posaconazole;
- (753) Posterior pituitary;
- (754) Potassium acetate injection;
- (755) Potassium acid phosphate — See exceptions;
- (756) Potassium p-aminobenzoate — See exceptions;
- (757) Potassium aminosaliclate — See exceptions;

- (758) Potassium arsenite — See exceptions;
- (759) Potassium bicarbonate — See exceptions;
- (760) Potassium carbonate — See exceptions;
- (761) Potassium chloride — See exceptions;
- (762) Potassium citrate — See exceptions;
- (763) Potassium gluconate — See exceptions;
- (764) Potassium hetacillin;
- (765) Potassium iodide — See exceptions;
- (766) Reserved;
- (767) Potassium permanganate — See exceptions;
- (768) Povidone — Iodine — See exceptions;
- (768.8) Pralatrexate;
- (769) Pralidoxime;
- (769.2) Pramipexole;
- (769.3) Pramlintide;
- (769.35) Prasugrel;
- (769.4) Pravastatin;
- (769.7) Praziquantel;
- (770) Prazosin;
- (770.5) Prednicarbate;
- (771) Prednisolone;
- (772) Prednisone;
- (773) Prilocaine;
- (774) Primaquine;
- (775) Primidone;
- (776) Probenecid;
- (777) Probucol;
- (778) Procainamide;
- (779) Procaine;
- (780) Procaine penicillin;
- (781) Procaine penicillin G;

- (782) Procarbazine;
- (783) Prochlorperazine;
- (784) Procyclidine;
- (785) Progesterone;
- (785.5) Proguanil;
- (786) Promazine;
- (787) Promethazine;
- (788) Promethestrol;
- (788.5) Propafenone;
- (789) Propantheline;
- (790) Proparacaine;
- (791) Propenpyridamine — See exceptions;
- (792) Propiolactone;
- (793) Propiomazine;
- (794) Propoxycaine;
- (795) Propranolol;
- (795.5) Propylhexedrine;
- (796) Propylparaben;
- (797) Propylthiouracil;
- (798) Protamine sulfate injection;
- (799) Protein hydrolysate injection;
- (800) Protein, Foreign injection;
- (801) Proteolytic enzyme;
- (802) Protirelin;
- (803) Protokylol;
- (804) Protoveratrine A and B;
- (805) Protriptyline;
- (805.5) Prussian blue;
- (806) Reserved;
- (807) Pseudomonas polysaccharide complex;
- (808) P-ureidobenzeneearsonic acid;

- (809) Purified protein derivatives of tuberculin;
- (810) Pyrantel;
- (811) Pyrazinamide;
- (812) Pyrazolon;
- (813) Pyridostigmine;
- (814) Pyrimethamine;
- (815) Pyrrobutamine;
- (816) Pyrvinium;
- (816.5) Quetiapine;
- (817) Quinacrine;
- (817.5) Quinapril;
- (818) Quinestrol;
- (819) Quinethazone;
- (820) Quinidine;
- (821) Quinine hydrochloride;
- (822) Quinine and urea hydrochloride;
- (822.3) Quinupristin;
- (822.5) Rabeprazole;
- (823) Rabies anti-serum;
- (824) Rabies immune globulin, Human;
- (825) Rabies vaccine;
- (826) Radio-iodinated compounds;
- (827) Radio-iodine;
- (828) Radio-iron;
- (829) Radioisotopes;
- (830) Radiopaque media;
- (831) Ragweed pollen extract;
- (831.02) Raloxifene;
- (831.03) Raltegravir;
- (831.04) Ramelteon;
- (831.05) Ramipril;

- (831.07) Ranibizumab;
- (831.1) Ranitidine — See exceptions;
- (831.3) Ranolazine;
- (831.5) Rapacuronium;
- (831.7) Rasagiline;
- (832) Rauwolfia serpentina;
- (832.2) Reboparhamil;
- (832.5) Regadenoson;
- (833) Rescinnamine;
- (834) Reserpine;
- (835) Reserpine alkaloids;
- (836) Resorcinol monoacetate — See exceptions;
- (836.3) Retapamulin;
- (836.5) Retinoic acid, all-trans;
- (837) Rhus toxicodendron antigen;
- (838) Rh D immune globulin, Human;
- (838.5) Ribavirin;
- (839) Riboflavin — See exceptions;
- (840) Ricinoleic acid;
- (840.5) Rifabutin;
- (841) Reserved;
- (842) Rifampin;
- (842.1) Rifapentine;
- (842.15) Rifaximin;
- (842.17) Rilonacept;
- (842.2) Riluzole;
- (842.4) Rimantadine;
- (842.7) Rimexolone;
- (843) Ringer's injection;
- (843.2) Risedronate;
- (843.3) Risperidone;

- (843.7) Ritodrine;
- (843.8) Ritonavir;
- (843.82) Rituximab;
- (843.83) Rivastigmine;
- (843.9) Rizatriptan;
- (844) Rocky mountain spotted fever vaccine;
- (844.5) Rocuronium;
- (844.7) Rofecoxib;
- (845) Rolitetracycline;
- (845.1) Romidepsin;
- (845.15) Romiplostim;
- (845.3) Ropinirole;
- (845.5) Ropivacaine;
- (845.7) Rosiglitazone;
- (845.8) Rosuvastatin;
- (845.9) Rotavirus vaccine;
- (845.95) Rotigotine;
- (846) Rotoxamine;
- (846.5) RSVIGIV;
- (847) Rubella and mumps virus vaccine;
- (848) Rubella virus vaccine;
- (848.5) Rufinamide;
- (849) Rutin — See exceptions;
- (849.5) Sacrosidase;
- (850) Salicylazosulfapyridine;
- (850.5) Salmeterol;
- (851) Salmonella typhosa, Killed;
- (851.02) Salvinorin A;
- (851.03) Samarium SM 153 lexidronam;
- (851.04) Saneromazile;
- (851.045) Sapropterin;

- (851.05) Saquinavir;
- (851.1) Saralasin acetate;
- (851.7) Saxagliptin;
- (852) Scopolamine;
- (852.1) Secretin;
- (852.6) Selegiline;
- (853) Selenium sulfide — See exceptions;
- (853.5) Selenomethionine;
- (854) Senecio cineraria extract ophthalmic solution;
- (855) Senega fluid extract;
- (855.3) Seractide acetate;
- (855.5) Sermorelin Acetate;
- (855.6) Sertaconazole;
- (855.7) Sertraline;
- (855.74) Sevelamer;
- (855.8) Sevoflurane;
- (855.85) Sildenafil;
- (855.9) Silodosin;
- (856) Silver nitrate ophthalmic solutions or suspensions;
- (857) Silver sulfadiazine cream;
- (857.3) Simethicone coated cellulose suspension;
- (857.5) Simvastatin;
- (858) Sincalide;
- (858.3) Sinecatechins;
- (858.5) Sirolimus;
- (858.7) Sitagliptin;
- (859) Sitosterols;
- (860) Solutions for injections, All;
- (861) Smallpox vaccine;
- (862) Sodium acetate injection;
- (863) Sodium acetrizoate;

- (864) Sodium ascorbate injection;
- (865) Sodium biphosphate — See exceptions;
- (866) Sodium cacodylate;
- (867) Sodium chloride injection;
- (868) Sodium dehydrocholate;
- (869) Sodium dextrothyroxine;
- (870) Sodium estrone;
- (871) Sodium fluorescein — See exceptions;
- (872) Sodium fluoride — See exceptions;
- (873) Sodium iothalamate;
- (873.5) Sodium nitroprusside;
- (873.7) Sodium phenylbutyrate;
- (874) Sodium polystyrene sulfonate;
- (875) Sodium propionated vaginal cream;
- (876) Sodium sulfacetamide;
- (877) Sodium sulfadiazine;
- (878) Sodium sulfobromophthalein;
- (879) Sodium sulfoxone;
- (880) Sodium tetradecyl;
- (880.5) Sodium thiosulfate;
- (881) Sodium tyropanoate;
- (881.05) Solifenacin;
- (881.1) Somatrem;
- (882) Somatropin;
- (882.5) Sorafenib;
- (883) Sorbus extract;
- (883.5) Sotalol;
- (883.8) Sparfloxacin;
- (884) Sparteine;
- (885) Spectinomycin;
- (886) Spirapril;

- (887) Spironolactone;
- (888) Staphage lysate bacterial antigen;
- (889) Staphylococcus and streptococcus vaccine;
- (890) Staphylococcus toxoid;
- (890.5) Stavudine;
- (891) Stibophen;
- (892) Stinging insect antigens — Combined;
- (893) Stockes expectorant;
- (894) Stramonium;
- (895) Streptococcus antigen;
- (896) Streptokinase-streptodornase;
- (897) Streptomycin;
- (898) Strontium — See exceptions;
- (899) Strophanthin-G;
- (900) Strychnine — See exceptions;
- (901) Succimer;
- (902) Succinylcholine;
- (903) Succinylsulfathiazole;
- (903.1) Sucralfate;
- (903.2) Sulconazole;
- (904) Sulfabenzamide vaginal preparations;
- (905) Sulfacetamide;
- (906) Sulfachlorpyridazine;
- (907) Sulfacytine;
- (908) Sulfadiazine;
- (909) Sulfadimethoxine;
- (909.1) Sulfadoxine;
- (910) Sulfaethidole;
- (911) Sulfaguanidine;
- (912) Sulfamerazine;
- (913) Sulfameter;

- (914) Sulfamethazine;
- (915) Sulfamethizole;
- (916) Sulfamethoxazole;
- (917) Sulfamethoxypyridazine;
- (918) Sulfanilamide;
- (919) Sulfaphenazole;
- (920) Reserved;
- (921) Sulfapyridine;
- (922) Sulfasalazine;
- (922.5) Sulfathiazole;
- (923) Sulfapyrazone;
- (924) Sulfisomidine;
- (925) Sulfisoxazole;
- (926) Sulfur thioglycerol;
- (927) Sulindac;
- (927.5) Sumatriptan;
- (927.7) Sunitinib;
- (928) Superinone;
- (928.1) Suprofen;
- (929) Sutilains;
- (930) Syrosingopine;
- (930.5) Tacrine;
- (930.7) Tacrolimus;
- (930.9) Tadalafil;
- (931) Tamoxifen;
- (931.1) Tamsulosin;
- (931.3) Tazarotene;
- (931.35) Tazobacam;
- (931.5) Technetium;
- (931.55) Tegaserod;
- (931.555) Telavancin;

- (931.56) Telbivudine;
- (931.57) Telithromycin;
- (931.6) Telmisartan;
- (931.7) Temafloxacin;
- (931.75) Temozolomide;
- (931.77) Temsirolimus;
- (931.8) Teniposide;
- (931.85) Terazosin;
- (931.9) Tenofovir;
- (931.95) Terbinafine — See exceptions;
- (932) Terbutaline;
- (932.05) Terconazole;
- (932.1) Terfenadine;
- (932.3) Teriparatide;
- (933) Terpin hydrate with codeine;
- (934) Reserved;
- (935) Tesamorelin;
- (936) Tetanus and diphtheria toxoids;
- (937) Tetanus antitoxin;
- (938) Tetanus immune globulin;
- (939) Tetanus toxoids;
- (939.5) Tetrabenazine;
- (940) Tetracaine;
- (941) Tetracycline;
- (942) Tetraethylammonium chloride;
- (943) Tetrahydrozoline — See exceptions;
- (943.5) Thalidomide;
- (944) Thallous chloride;
- (945) Theobromide;
- (945.5) Theobromine;
- (946) Theobromine magnesium oleate;

- (947) Theophylline — See exceptions;
- (948) Theophylline sodium glycinate;
- (949) Thiabendazole;
- (950) Thiamylal;
- (951) Thiethylperazine;
- (952) Thiopropazate;
- (953) Thioguanine;
- (954) Thioridazine;
- (955) Thiosalicylate;
- (956) Thiotepa;
- (957) Thiothixene;
- (958) Thiphenamil;
- (959) Thrombin;
- (960) Thyroglobulin;
- (961) Thyroid;
- (962) Thyrotropin;
- (963) Thyroxine;
- (964) Thyroxine fraction;
- (964.5) Tiagabine;
- (965) Ticarcillin;
- (965.5) Ticlopidine;
- (966) Ticrynafen;
- (966.3) Tigecycline;
- (966.6) Tiludronate;
- (967) Timolol;
- (967.1) Tinidazole;
- (967.2) Tinzaparin;
- (967.3) Tioconazole — See exceptions;
- (967.5) Tiopronin;
- (967.55) Tiotropium;
- (967.57) Tipranavir;

- (967.6) Tirofiban;
- (967.7) Tizanidine;
- (968) Tobramycin;
- (968.1) Tocainide;
- (969) Tocamphyl;
- (969.6) Tocilizumab;
- (970) Tolazamide;
- (971) Tolazoline;
- (972) Tolbutamide;
- (972.5) Tolcapone;
- (973) Tolmetin;
- (973.05) Tolterodine;
- (973.07) Tolvaptan;
- (973.1) Topiramate;
- (973.3) Topotecan;
- (973.4) Toremifene;
- (973.5) Torsemide;
- (973.7) Tramadol;
- (973.8) Trandolapril;
- (973.9) Tranexamic acid;
- (974) Tranylcypromine;
- (974.4) Travoprost;
- (974.5) Trazodone;
- (974.7) Treprostinil;
- (975) Tretinoin;
- (976) Triamcinolone;
- (977) Triamterene;
- (978) Trichlormethiazide;
- (979) Trichloroacetic acid — See exceptions;
- (980) Trichloroethylene — See exceptions;
- (981) Trichlobisonium;

- (982) Triclofos;
- (983) Tridihexethyl chloride;
- (983.1) Trientine;
- (984) Triethanolamine polypeptides;
- (985) Triethylenethiophosphoramidate;
- (986) Trifluoperazine;
- (987) Triflupromazine;
- (988) Trifluridine;
- (989) Trihexyphenidyl;
- (990) Triiodothyronine;
- (990.1) Trilostane;
- (991) Trimeprazine;
- (992) Trimethadione;
- (993) Trimethaphan cansylate;
- (994) Trimethobenzamide;
- (995) Trimethoprim;
- (995.5) Trimetrexate;
- (996) Trimipramine;
- (997) Triolein;
- (998) Trioxsalen;
- (999) Tripelennamine — See exceptions;
- (1000) Triphenyltetrazolium;
- (1001) Triple sulfas;
- (1002) Triprolidine — See exceptions;
- (1002.5) Triptorelin;
- (1003) Trisulfapyrimidines;
- (1003.5) Troglitazone;
- (1004) Troleandomycin;
- (1005) Trolnitrate;
- (1006) Tromethamine;
- (1007) Tropicamide;

- (1007.3) Trosipium;
- (1007.5) Trovafloxacin;
- (1008) Trypsin;
- (1009) Trypsin-chymotrypsin;
- (1010) Tuaminoheptane;
- (1011) Tuberculin, Purified protein derivatives;
- (1012) Tuberculin tine test;
- (1013) Tuberculin, Old;
- (1014) Tubocurarine;
- (1015) Tybamate;
- (1016) Typhoid and paratyphoid vaccine;
- (1017) Typhus vaccine;
- (1018) Tyropanoate;
- (1018.5) Ulipristal;
- (1019) Undecoylium;
- (1019.5) Unoprostone;
- (1020) Uracil;
- (1021) Urea — See exceptions;
- (1021.3) Urofollitropin;
- (1021.5) Ursodiol;
- (1021.6) Ustekinumab;
- (1021.7) Valacyclovir;
- (1021.8) Valdecoxib;
- (1022) Valethamate;
- (1022.2) Valganciclovir;
- (1023) Valproate;
- (1024) Valproic acid — See exceptions;
- (1024.3) Valrubicin;
- (1024.5) Valsartan;
- (1025) Vancomycin;
- (1025.5) Vardenafil;

- (1025.7) Varenicline;
- (1026) Vasopressin;
- (1027) VDRL antigen;
- (1027.1) Vecuronium bromide;
- (1027.3) Velaglucerase;
- (1027.5) Velnacrine;
- (1027.6) Venlafaxine;
- (1027.7) Verapamil;
- (1028) Veratrum viride;
- (1029) Versenate;
- (1029.5) Verteporfin;
- (1030) Vidarabine;
- (1030.3) Vigabatrin;
- (1031) Vinblastine;
- (1032) Vincristine;
- (1032.5) Vinorelbine;
- (1033) Vinyl ethyl — See exceptions;
- (1034) Viomycin;
- (1035) Vitamin K;
- (1036) Vitamin B12 injection;
- (1037) Vitamine with fluoride;
- (1037.5) Voriconazole;
- (1037.7) Vorinostat;
- (1038) Warfarin;
- (1039) Wargarin;
- (1039.1) Xylocaine;
- (1040) Yellow fever vaccine;
- (1041) Yohimbine;
- (1042) 4-chloro-3, 5-xyleneol — See exceptions;
- (1042.01) Zafirlukast;
- (1042.02) Zalcitabine;

- (1042.03) Zanamivir;
- (1042.05) Zidovudine;
- (1042.4) Zileuton;
- (1042.7) Zinc acetate — See exceptions;
- (1042.75) Ziprasidone;
- (1042.8) Zoledronic Acid;
- (1042.9) Zolmitriptan;
- (1042.92) Zonisamide;
- (1043) Devices that require a prescription:

(A) Cellulose, Oxadized, Regenerated (surgical absorbable hemostat) — See exceptions;

(B) Diaphragms for vaginal use;

(C) Hemodialysis solutions;

(D) Hemodialysis kits;

(E) Lippes loop intrauterine;

(F) Saf-T-Coil intrauterine device;

(G) Intrauterine devices, All;

(H) Absorbable hemostat;

(I) Gonorrhea test kit.

(c) The following are exceptions to and exemptions from subsection (b) of this Code section:

(1) Atropine sulfate — where the oral dose is less than 1/200 gr. per unit;

(2) Bacitracin cream or ointment for topical use;

(3) Belladonna or belladonna alkaloids when in combination with other drugs and the dosage unit is less than 0.1 mg. of the alkaloids or its equivalent;

(3.5) Bentoquatam — when used with a strength of 5 percent or less in topical preparations;

(4) Beta carotene — all forms occurring in food products or lotions;

(5) Bromelain, pancreatic enzymes, trypsin and bile extract — when labeled properly as digestive aids with appropriate dosage and in compliance with FDA labeling and restrictions;

(6) Brompheniramine — where a single dosage unit is 4 mg. or less but with no more than 3 mg. of the dextrorotary optical isomer of racemic brompheniramine per released dose;

(6.2) Butenafine — when used with a strength of 1 percent or less as a topical preparation;

(6.4) Butoconazole — when used with a strength up to 2 percent in a vaginal preparation;

(6.45) Capsaicin — when in an external analgesic with concentration of 0.25 percent or less;

(6.5) Cetirizine — when a single dosage unit is either 1mg per 1ml or less or 10mg or less;

(6.7) Chlorhexadine — when used with a strength up to 4 percent in a topical skin product;

(7) Chlorpheniramine — where a single dosage unit is 12 mg. or less;

(7.1) Cimetidine — when a single dosage unit is 200 mg. or less;

(7.3) Clemastine — where a single dose is 1.34 mg. or less;

(7.5) Clotrimazole — when a single vaginal insert is 200 mg. or less or with a strength up to 2 percent in a topical skin, topical vaginal, or vaginal product;

(7.8) Cromolyn — when used as cromolyn sodium in a nasal solution of 4 percent or less in strength;

(7.9) Dexbrompheniramine — when a single dosage unit is 6 mg. or less;

(8) Diphenhydramine — up to 12.5 mg. in each 5 cc's when used in cough preparations and up to 50 mg. per single dose when used as a nighttime sleep aid or used as an antihistamine and labeled in compliance with FDA requirements;

(8.5) Docosanol — when used in 10 percent topical preparation to treat fever blisters, cold sores, or fever blisters and cold sores.

(9) Doxylamine succinate — where a single dosage form is 25 mg. or less and when labeled to be used as a nighttime sedative;

(9.3) Edetate — when used in any form other than an oral or parenteral;

(9.5) Famotidine — when a single dosage unit is 20 mg. or less;

(9.6) Fexofenadine — when packaged for distribution as an over-the-counter (OTC) drug product;

(9.7) Fluoride — when used with a strength up to 1,500 parts per million in an oral care or dentifrice product;

(9.8) Glycine — when used with a strength up to 1.5 percent in an irrigation solution, when used in a topical skin product;

(10) Hydrocortisone topical skin preparations up to 1.0 percent in strength;

(11) Hydroxocobalamin, riboflavin, niacinamide, ergocalciferol (maximum of 400 I.U. per day), Folic acid (maximum of 0.4 mg. per day), and magnesium gluconate — when as a source of vitamins and dietary supplement but must bear such labels and adhere to such restrictions of FDA regulations;

(11.1) Ibuprofen — where a single dose is 200 mg. or less;

(11.6) Reserved;

(12) Insulin — all injectable products which do not require a prescription drug order and bear a label which indicates “Rx Use Only” or are otherwise listed under subsection (b) of this Code section; and no injectable insulin product may be sold except by a pharmacy issued a permit by the State Board of Pharmacy or by a medical practitioner authorized to dispense medications;

(12.3) Ketoconazole — when used with a strength of 1 percent or less in topical preparations;

(12.5) Ketoprofen — when a single dosage unit is 12.5 mg. or less;

(12.7) Ketotifen — when used with a strength of 0.025 percent or less in an ophthalmic solution;

(12.9) Lansoprazole — when a single dosage unit is 15 mg. or less;

(13) Lidocaine topical ointment, 25 mg./gm. or less;

(13.5) Loperamide — where a single dose is either 1 mg. per 5 ml. or 2 mg. per dosage unit;

(13.7) Loratadine — when used in a single dose of 10 mg. or less, including doses used in combination with other drugs provided for under this subsection;

(14) Meclizine — 25 mg. or less;

(14.1) Miconazole — when used as antifungal powder or cream, or both, and containing not more than 4 percent of miconazole, or when used as a vaginal insert and containing not more than 1,200 mg. of miconazole;

(14.2) Minoxidil — when used with a strength of 5 percent or less in topical preparations;

(14.3) Naphazoline — when used in an ophthalmic solution in a concentration of 0.027 percent or less in combination with a pheniramine concentration of 0.315 percent or less;

(14.5) Naproxen — where a single dosage unit is 220 mg. or less;

(15) Neomycin sulfate ointment or cream for topical use;

(15.5) Nicotine resin complex (polacrilex) — when used as oral chewing gum where a single dose (piece of gum) is 4 mg. or less;

(15.55) Nicotine transdermal system — when used in a strength of 21 mg. or less per transdermal patch (transdermal delivery system);

(16) Nitrous oxide — air products suppliers shall not sell medical grade nitrous oxide to other than licensed practitioners or medical suppliers; industrial grade nitrous oxide shall only be sold when mixed with not less than 100 parts per million of sulfur dioxide and used as a fuel additive for combustion engines or when used in industrial laboratory equipment;

(16.3) Nizatidine — when a single dosage unit is 75 mg. or less;

(16.8) Nonoxynol — when used with a strength up to 12.5 percent or 1 gram per dose in a vaginal product;

(16.9) Omeprazole — when a single dosage unit is 20.6 mg. or less;

(16.95) Orlistat — when a single dosage unit is 60 mg. or less;

(17) Oxygen — compressed oxygen which is not labeled “CAUTION: Federal law prohibits dispensing without prescription” or similar wording;

(17.3) Permethrin — when used as a topical preparation in a strength of 1 percent or less;

(17.5) Phenazopyridine — where a single dose is 100 mg. or less, as approved by the federal Food and Drug Administration;

(18) Pheniramine — when the oral dose is 25 mg. or less, or when used in an ophthalmic solution in a concentration of 0.315 percent or less in combination with a naphazoline concentration of 0.027 percent or less;

(19) Polymyxin B when in combination with other drugs in an ointment or cream for topical use;

(20) Any potassium electrolyte when manufactured for use as a dietary supplement, food additive for industrial, scientific, or commercial use, or when added to other drug products when the product is not intended as a potassium supplement but must bear such labels and adhere to such restrictions of FDA regulations;

- (21) Povidone — Iodine solutions and suspensions;
- (22) Reserved;
- (23) Reserved;
- (23.5) Ranitidine — when a single dosage unit is 150 mg. or less;
- (24) Rutin — where the dosage unit is less than 60 mg.;
- (25) Selenium sulfide suspension 1 percent or less in strength;
- (25.1) Strychnine — when used in combination with other active ingredients in a rodent killer, and when not bearing a label containing the words “CAUTION: Federal law prohibits dispensing without prescription” or other similar wording;
- (25.5) Terbinafine — when used with a strength of 1 percent or less in a topical antifungal cream;
- (26) Tetrahydrozoline for ophthalmic or topical use;
- (27) Theophylline preparations alone or in combination with other drugs prepared for and approved for OTC (over the counter) sale by FDA; example — tedral tablets (plain) or oral suspension;
- (27.5) Tioconazole — when used with a strength of 1 percent or less in topical preparations or when used with a strength of 6.5 percent or less in vaginal preparations;
- (28) Tripelennamine cream or ointment for topical use;
- (28.5) Triprolidine — when a single dose is 5 mg. or less when combined in the same preparation as one or more other drug products for use as an antihistamine or decongestant or an antihistamine and decongestant;
- (29) Urea — except when the manufacturer’s label contains the wording “CAUTION: Federal law prohibits dispensing without prescription” or similar wording;
- (29.5) Zinc acetate — when used in topical preparations;
- (30) Any drug approved by FDA for animal use and the package does not bear the statement “CAUTION: Federal law prohibits dispensing without prescription” or similar wording; or
- (31) Loperamide Oral Liquid (1.00 mg/5.00 ml).

(d) The following list of compounds or preparations may be purchased without a prescription, provided the products are manufactured for industrial, scientific, or commercial sale or use, unless they are intended for human use or contain on the label “CAUTION: Federal law prohibits dispensing without prescription” or similar wording:

- (1) Aminosalicylate;
- (2) Aminosalicylate calcium;
- (3) Aminosalicylate potassium;
- (4) Aminosalicylate sodium;
- (5) Aminosalicylic acid;
- (6) Barium;
- (7) Beta-carotene;
- (8) Bismuth sodium tartrate;
- (9) Cadmium sulfide;
- (10) Calcium disodium edetate;
- (11) Cellulose, Oxadized, Regenerated;
- (12) Chlorabutanol;
- (13) Chloranil;
- (14) Chloroacetic acid;
- (15) Chloroform;
- (16) Colchicine;
- (17) Dapsone;
- (18) Dimethyl sulfoxide;
- (19) Disodium edetate;
- (20) Edetate disodium;
- (21) Ether;
- (22) Ethoxazene;
- (23) Ethyl chloride;
- (24) Fluoride;
- (25) Formaldehyde;
- (26) Gold thiosulfate;
- (27) Hexachlorophene;
- (28) Iodobenzoic acid;
- (29) Iopanoic acid;
- (30) Lindane;
- (31) Lithium carbonate;

- (32) Mandelic acid;
- (33) Mannitol;
- (34) Mercury bichloride;
- (35) Nitroprusside;
- (36) Potassium aminosalicylate;
- (37) Potassium p-aminobenzoate;
- (37.5) Potassium perchlorate;
- (38) Potassium permanganate;
- (39) Resorcinol monoacetate;
- (40) Selenium sulfide;
- (41) Sodium biphosphate;
- (42) Sodium fluorescein;
- (43) Sodium fluoride;
- (44) Strontium;
- (45) Trichloroacetic acid;
- (46) Trichloroethylene;
- (47) Valproic acid;
- (48) Vinyl ether;
- (49) 4-chloro-3, 5-xyleneol.

(e) The State Board of Pharmacy may delete drugs from the dangerous drug list set forth in this Code section. In making such deletions the board shall consider, with respect to each drug, the following factors:

- (1) The actual or relative potential for abuse;
- (2) The scientific evidence of its pharmacological effect, if known;
- (3) The state of current scientific knowledge regarding the drug;
- (4) The history and current pattern of abuse, if any;
- (5) The scope, duration, and significance of abuse;
- (6) Reserved;

(7) The potential of the drug to produce psychic or physiological dependence liability; and

(8) Whether such drug is included under the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040 (1938), 21 U.S.C. Section 301, et seq.,

as amended. (Code 1933, § 79A-702, enacted by Ga. L. 1967, p. 296, § 1; Ga. L. 1972, p. 948, § 1; Ga. L. 1976, p. 631, § 1; Ga. L. 1978, p. 1668, § 5; Ga. L. 1979, p. 859, § 3; Ga. L. 1980, p. 1746, § 2; Ga. L. 1981, p. 557, § 2; Ga. L. 1982, p. 3, § 16; Ga. L. 1982, p. 2403, §§ 3-8, 20; Ga. L. 1983, p. 3, § 13; Ga. L. 1983, p. 349, §§ 3-6; Ga. L. 1984, p. 22, § 16; Ga. L. 1984, p. 1019, §§ 3-5; Ga. L. 1985, p. 1219, §§ 8, 9; Ga. L. 1986, p. 1555, §§ 6, 7; Ga. L. 1987, p. 261, § 7; Ga. L. 1989, p. 233, §§ 7, 8; Ga. L. 1990, p. 640, §§ 2, 3; Ga. L. 1991, p. 312, § 2; Ga. L. 1992, p. 6, § 16; Ga. L. 1992, p. 1131, §§ 5-7; Ga. L. 1993, p. 590, §§ 4-7; Ga. L. 1994, p. 169, §§ 6, 7; Ga. L. 1994, p. 849, § 1; Ga. L. 1996, p. 356, §§ 3-5; Ga. L. 1997, p. 1311, §§ 6-10; Ga. L. 1998, p. 778, §§ 3-6; Ga. L. 1999, p. 81, § 16; Ga. L. 1999, p. 643, §§ 2-5; Ga. L. 2000, p. 1317, §§ 4-6; Ga. L. 2001, p. 816, §§ 4-6; Ga. L. 2003, p. 349, §§ 8-11; Ga. L. 2004, p. 488, §§ 4-7; Ga. L. 2005, p. 1028, §§ 2, 3/SB 89; Ga. L. 2006, p. 219, §§ 3-5/HB 1054; Ga. L. 2007, p. 47, § 16/SB 103; Ga. L. 2007, p. 605, §§ 3-5/HB 286; Ga. L. 2008, p. 169, §§ 6, 7, 8/HB 1090; Ga. L. 2009, p. 126, § 5/HB 368; Ga. L. 2010, p. 860, §§ 5, 6, 7/SB 353; Ga. L. 2010, p. 905, § 1/HB 1021; Ga. L. 2011, p. 656, §§ 7-10/SB 93.)

The 2009 amendment, effective April 21, 2009, added paragraphs (b)(26.5), (b)(82.7), (b)(160), (b)(196.5), (b)(240.6), (b)(256.5), (b)(277.57), (b)(331.06), (b)(379.5), (b)(381.75), (b)(383.45), (b)(406.35), (b)(406.93), (b)(408.85), (b)(509.7), (b)(517.25), (b)(604.5), (b)(742.3), (b)(832.5), (b)(842.17), (b)(845.15), (b)(848.5), (b)(855.9), and (b)(939.5).

The 2010 amendments. — The first 2010 amendment, effective June 3, 2010, in subsection (b), added paragraphs (b)(.043), (b)(65.5), (b)(66.5), (b)(91.3), (b)(91.8), (b)(130.3), (b)(133.05), (b)(209.5), (b)(244.4), (b)(259.5), (b)(324.5), (b)(328.5), (b)(380.3), (b)(382.25), (b)(383.43), (b)(408.35), (b)(424.4), (b)(464.67), (b)(531.5), (b)(617.47), (b)(661.6), (b)(692.3), (b)(740.5), (b)(768.8), (b)(769.35), (b)(845.1), (b)(851.7), (b)(931.555), (b)(969.6), (b)(973.07), (b)(1021.6), and (b)(1030.3), and added “— see exceptions” at the end of paragraph (b)(512.5); and, in subsection (c), added paragraphs (c)(6.45) and (c)(12.9). The second 2010 amendment, effective July 1, 2010, added paragraph (b)(851.02).

The 2011 amendment, effective May 13, 2011, substituted “Carglumic Acid” for “Reserved” in paragraph (b)(143); added

“— See exceptions” in paragraph (b)(383.5); deleted paragraph (b)(406.93), which read: “Fospropofol”; deleted paragraph (b)(793.5), which read: “Propofol”; substituted “Reserved” for “Pseudoephedrine— See exceptions” in paragraph (b)(806); and substituted “Tesamorelin” for “Reserved” in paragraph (b)(935); added paragraphs (b)(19.3), (b)(122.3), (b)(153.35), (b)(213.1), (b)(235.5), (b)(237.1), (b)(247.7), (b)(273.5), (b)(346.05), (b)(386.7), (b)(469.05), (b)(525.2), (b)(531.7), (b)(692.517), (b)(747.4), (b)(1018.5), and (b)(1027.3); added paragraph (c)(9.6); and substituted “Reserved” for “Pseudoephedrine — when a single dosage unit is 60 mg. or less or when manufactured in an extended release form with a dosage unit of 240 mg. or less” in paragraph (c)(23).

Cross references. — Authority of director of Georgia Drugs and Narcotics Agency to compile and distribute pamphlet listing unlawful narcotics and dangerous drugs, § 26-4-29.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1985, paragraph designated (509.1) in subsection (b) was correctly redesignated as (509.2).

Pursuant to Code Section 28-9-5, in 1986, in the first sentence of subsection (a) “U.S.C.” was substituted for “USC”.

Pursuant to Code Section 28-9-5, in 1988, a colon was substituted for a period at the end of the introductory language of subsection (c).

Pursuant to Code Section 28-9-5, in 1989, a period was substituted for the semicolon at the end of paragraph (c)(31).

Pursuant to Code Section 28-9-5, in 1990, a semicolon was substituted for a period at the end of paragraph (c)(11.6).

Pursuant to Code Section 28-9-5, in 1996, in subsection (a) and in paragraph (e)(8), "21 U.S.C. Section 301, et seq." was substituted for "21 U.S.C. 301 et seq."; a semicolon was substituted for a colon at the end of paragraphs (b)(402.8) and (b)(402.9); "mg." was substituted for "mg" in paragraphs (c)(7.1), (c)(9.5), and (c)(12.5).

Pursuant to Code Section 28-9-5, in 1997, "Reserved" was substituted for "Potassium perchlorate" in paragraph (b)(766).

Pursuant to Code Section 28-9-5, in 1998, paragraph (b)(66) was redesignated

as paragraph (b)(68.5), paragraph (b)(67) was redesignated as paragraph (b)(66), paragraph (b)(67.3) was redesignated as paragraph (b)(67), new paragraph (b)(68.13) was redesignated as paragraph (b)(68.2), paragraph (b)(68.15) was redesignated as paragraph (b)(68.3), former paragraph (b)(68.2) was redesignated as present paragraph (b)(68.4), and former paragraph (b)(68.3) was redesignated as present paragraph (b)(68.6).

Pursuant to Code Section 28-9-5, in 2001, paragraph (b)(160.2) was redesignated as paragraph (b)(160.20).

Pursuant to Code Section § 28-9-5, in 2007, paragraph (b)(616.05) was redesignated as paragraph (b)(615.9) and a misspelling of "solution" was corrected in paragraph (c)(12.7).

Law reviews. — For survey article on criminal law and procedure, see 34 Mercer L. Rev. 89 (1982).

For note on 2000 amendment of this Code section, see 17 Georgia St. U.L. Rev. 85 (2000).

JUDICIAL DECISIONS

Former Code 1933, § 79A-9915 plainly and specifically makes the offenses charged, possession, sale, and delivery of an amphetamine, a felony and former Code 1933, § 79A-702 did not require a different conclusion. *Gee v. State*, 225 Ga. 669, 171 S.E.2d 291 (1969) (see O.C.G.A. § 16-13-71).

In event of uncertainty, lesser of two penalties applies. — When uncertainty develops regarding which penal clause applies, an accused is entitled to have the lesser of two penalties administered. *Hartley v. State*, 159 Ga. App. 157, 282 S.E.2d 684 (1981).

State's expert guess not competent evidence. — In the prosecution of a juvenile for possession of Diphenhydramine, the state's expert, who had not weighed the drug and could not testify, based on accurate measurements, whether the amount of the drug was less than the amount excepted in O.C.G.A. § 16-13-71(c)(8), was not competent to testify, and the evidence adduced was insufficient for conviction. *In re L.L.*, 207 Ga. App. 785, 429 S.E.2d 156 (1993).

Jury was authorized to conclude that the defendant intended to possess a dangerous drug in violation of the Dangerous Drug Act, O.C.G.A. § 16-13-72, even if the defendant was subjectively unaware of the precise chemical compound in the bottle and its regulated nature, because there was evidence supporting an inference that the defendant used a dangerous drug to sedate the defendant's sexual battery victim, and that conduct demonstrated the defendant's knowledge of the harmful effect of the compound; the term "dangerous drug" was defined to include alkyl nitrite, which was the compound the defendant possessed. *Serna v. State*, 308 Ga. App. 518, 707 S.E.2d 904 (2011).

Trial court did not err in convicting the defendant of possession of dangerous drugs in violation of the Dangerous Drug Act, O.C.G.A. § 16-13-72, because the variance between the allegations in the indictment and the proof at trial was not fatal since even though the indictment accused the defendant of possessing amyl nitrate, which was not included in the list of dangerous drugs, the bottle the defen-

dant possessed contained alkyl nitrite, which was classified as a dangerous drug under the Act, O.C.G.A. § 16-13-71(b)(21.1); the defense was not compromised at trial, and the defendant was protected from a second prosecution for the same offense because the name of the indicted chemical and the proven chemical were similar, the indictment notified the defendant of the date of the offense, the type of offense, and the basis for the offense, and the defendant was

convicted of the same offense listed in the indictment. *Serna v. State*, 308 Ga. App. 518, 707 S.E.2d 904 (2011).

Cited in *Ellis v. State*, 132 Ga. App. 684, 209 S.E.2d 106 (1974); *Tischmak v. State*, 133 Ga. App. 534, 211 S.E.2d 587 (1974); *State v. Bonini*, 236 Ga. 896, 225 S.E.2d 907 (1976); *Little v. State*, 157 Ga. App. 462, 278 S.E.2d 17 (1981); *Ancrum v. State*, 197 Ga. App. 819, 399 S.E.2d 574 (1990).

OPINIONS OF THE ATTORNEY GENERAL

Control of dangerous drugs is vested with the State Board of Pharmacy and the chief drug inspector (now director of Georgia Drugs and Narcotics Agency). 1975 Op. Att'y Gen. No. 75-23.

State Board of Pharmacy is empowered to regulate dispensing of drugs

in hospitals. — Dispensing of drugs in hospitals by machine or otherwise is a matter which the legislature has left to the State Board of Pharmacy to regulate through its rule-making power. 1969 Op. Att'y Gen. No. 69-85.

16-13-71.1. "Anabolic steroid" defined.

Repealed by Ga. L. 1991, p. 312, § 3, effective April 4, 1991.

Editor's notes. — This Code section was based on Ga. L. 1989, p. 238, § 1.

16-13-72. Sale, distribution, or possession of dangerous drugs.

Except as provided for in this article, it shall be unlawful for any person, firm, corporation, or association to sell, give away, barter, exchange, distribute, or possess in this state any dangerous drug, except under the following conditions:

(1) A drug manufacturer, wholesaler, distributor, or supplier holding a license or registration issued in accordance with the Federal Food, Drug, and Cosmetic Act and authorizing the holder to possess dangerous drugs may possess dangerous drugs within this state but may not distribute, sell, exchange, give away, or by any other means supply dangerous drugs without a permit issued by the State Board of Pharmacy. Any drug manufacturer, wholesaler, distributor, or supplier holding a permit issued by the State Board of Pharmacy may sell, give away, exchange, or distribute dangerous drugs within this state, but only to a pharmacy, pharmacist, a practitioner of the healing arts, and educational institutions licensed by the state, or to a drug wholesaler, distributor, or supplier, and only if such distribution is made in the normal course of employment;

(2) A pharmacy may possess dangerous drugs, but the same shall not be sold, given away, bartered, exchanged, or distributed except by a licensed pharmacist in accordance with this article;

(3) A pharmacist may possess dangerous drugs but may sell, give away, barter, exchange, or distribute the same only when he compounds or dispenses the same upon the prescription of a practitioner of the healing arts. No such prescription shall be refilled except upon the authorization of the practitioner who prescribed it;

(4) A practitioner of the healing arts may possess dangerous drugs and may sell, give away, barter, exchange, or distribute the same in accordance with Code Section 16-13-74;

(4.1) A physician in conformity with Code Section 43-34-23 may delegate to a nurse or a physician assistant the authority to possess vaccines and such other drugs as specified by the physician for adverse reactions to those vaccines, and a nurse or physician assistant may possess such drugs pursuant to that delegation; provided, however, that nothing in this paragraph shall be construed to restrict any authority of nurses or physician assistants existing under other provisions of law;

(4.2) A registered professional nurse licensed under Article 1 of Chapter 26 of Title 43 who is employed or engaged by a licensed home health agency may possess sterile saline, sterile water, and diluted heparin for use as intravenous maintenance for use in a home health setting, and such nurse may administer such items to patients of the home health agency upon the order of a licensed physician. The State Board of Pharmacy shall be authorized to adopt regulations governing the storage, quantity, use, and administration of such items; provided, however, nothing in this paragraph or in such regulations shall be construed to restrict any authority of nurses existing under other provisions of law;

(4.3) Possession, planting, cultivation, growing, or harvesting of *Salvia divinorum* or *Salvia divinorum* A strictly for aesthetic, landscaping, or decorative purposes;

(5) A manufacturer's sales representative may distribute a dangerous drug as a complimentary sample only upon the written request of a practitioner. The request must be made for each distribution and shall contain the names and addresses of the supplier and the requestor and the name and quantity of the specific dangerous drug requested. The written request shall be preserved by the manufacturer for a period of two years; and

(6) Such person, firm, corporation, or association shall keep a complete and accurate record of all dangerous drugs received, pur-

chased, manufactured, sold, dispensed, or otherwise disposed of and shall maintain such records for at least two years or in conformance with any other state or federal law or rule issued by the State Board of Pharmacy. (Code 1933, § 79A-703, enacted by Ga. L. 1967, p. 296, § 1; Ga. L. 1972, p. 948, § 2; Ga. L. 1975, p. 690, § 1; Ga. L. 1982, p. 3, § 16; Ga. L. 1996, p. 356, § 6; Ga. L. 1998, p. 219, § 1; Ga. L. 1999, p. 643, § 5.2; Ga. L. 2003, p. 140, § 16; Ga. L. 2009, p. 859, § 5/HB 509; Ga. L. 2010, p. 905, § 2/HB 1021.)

The 2009 amendment, effective July 1, 2009, in paragraph (4.1), substituted “physician assistant” for “physician’s assistant” three times and substituted “Code Section 43-34-23” for “Code Section 43-34-26.1” near the beginning.

The 2010 amendment, effective July 1, 2010, added paragraph (4.3).

Cross references. — Pharmacists and pharmacies generally, § 26-4-1 et seq. Reward for furnishing information leading to arrest and conviction of person charged

with selling dangerous drugs in violation of section, § 45-12-37.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1992, “Federal Food, Drug, and Cosmetic Act” was substituted for “Federal Food, Drug and Cosmetic Act” in paragraph (1).

Pursuant to Code Section 28-9-5, in 2011, “Georgia” was deleted preceding “State Board of Pharmacy” at the end of paragraph (6).

JUDICIAL DECISIONS

Pharmacy license as defense to drug possession charge. — Whether an individual has a license or is otherwise lawfully permitted to have in the individual’s possession narcotic drugs under O.C.G.A. Ch. 13, T. 16 is matter of defense and not an element of the offense. *Woods v. State*, 233 Ga. 347, 211 S.E.2d 300 (1974), appeal dismissed, 422 U.S. 1002, 95 S. Ct. 2623, 45 L. Ed. 2d 667 (1975).

Selling and possessing prohibited drugs are separate offenses. — Neither offense of selling or possessing prohibited drugs is a necessary element in, or constitutes an essential part of, the other offense. They are in law separate and distinct offenses, and may be punished as separate crimes. *Gee v. State*, 225 Ga. 669, 171 S.E.2d 291 (1969).

Sale proscribed under this article is not included offense of sale under Article 2 of chapter. — Offense of sale of methaqualone as proscribed and made a misdemeanor by O.C.G.A. Art. 3, Ch. 13, T. 16 is not an included offense of sale of methaqualone as proscribed and made a felony by O.C.G.A. Art. 2, Ch. 13, T. 16 (Controlled Substances Act), since purposes of the two Acts and legislative intent

in enacting them are different. Different facts and elements must be proved when proving offense under either Act even though sale of methaqualone is gravamen of each offense. *Head v. State*, 160 Ga. App. 4, 285 S.E.2d 735 (1981).

Trial court did not err in convicting the defendant of possession of dangerous drugs in violation of the Dangerous Drug Act, O.C.G.A. § 16-13-72, because the variance between the allegations in the indictment and the proof at trial was not fatal since even though the indictment accused the defendant of possessing amyl nitrate, which was not included in the list of dangerous drugs, the bottle the defendant possessed contained alkyl nitrite, which was classified as a dangerous drug under the Act, O.C.G.A. § 16-13-71(b)(21.1); the defense was not compromised at trial, and the defendant was protected from a second prosecution for the same offense because the name of the indicted chemical and the proven chemical were similar, the indictment notified the defendant of the date of the offense, the type of offense, and the basis for the offense, and the defendant was convicted of the same offense listed in the

indictment. *Serna v. State*, 308 Ga. App. 518, 707 S.E.2d 904 (2011).

Evidence was insufficient for drug possession charge. — Evidence was insufficient to support a conviction for possession of diphenhydramine under O.C.G.A. § 16-13-72 where the forensic chemist did not testify as to the amount contained in the diphenhydramine pills,

nor did the chemist testify that the pills failed to comply with Food and Drug Administration labeling requirements. *Jackson v. State*, 251 Ga. App. 781, 555 S.E.2d 136 (2001).

Cited in *White v. State*, 230 Ga. 327, 196 S.E.2d 849 (1973); *Hartley v. State*, 159 Ga. App. 157, 282 S.E.2d 684 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Drugs and Controlled Substances, §§ 19 et seq., 27, 47, 89.

C.J.S. — 28 C.J.S., Drugs and Narcotics, §§ 25, 65 et seq.

ALR. — Charge of illegal sale of narcotics or intoxicating liquor predicated upon defendant's issuance of prescription therefor otherwise than in the course of his professional practice, 133 ALR 1140.

Construction and effect of "sale" or "sell" in Uniform Narcotic Drug Act, 93 ALR2d 1008.

Admissibility, in prosecution for illegal sale of narcotics, of evidence of other sales, 93 ALR2d 1097.

Free exercise of religion as defense to prosecution for narcotic or psychedelic drug offense, 35 ALR3d 939.

Permitting unlawful use of narcotics in

private home as criminal offense, 54 ALR3d 1297.

Conviction of possession of illicit drugs found in premises of which defendant was in nonexclusive possession, 56 ALR3d 948.

Promotional efforts directed toward prescribing physician as affecting prescription drug manufacturer's liability for product-caused injury, 94 ALR3d 1080.

Common-law right of action for damage sustained by plaintiff in consequence of sale or gift of intoxicating liquor or habit-forming drug to another, 97 ALR3d 528; 62 ALR4th 16.

Social host's liability for injuries incurred by third parties as a result of intoxicated guest's negligence, 62 ALR4th 16.

16-13-72.1. Revocation of dangerous drug permit; forfeiture.

(a) A permit issued by the State Board of Pharmacy under paragraph (1) of Code Section 16-13-72 may be suspended or revoked by the State Board of Pharmacy upon a finding that the drug manufacturer, wholesaler, distributor, or supplier:

(1) Has furnished false or fraudulent material information in any application filed under this article;

(2) Has been convicted of a felony under any state or federal law relating to any controlled substance or has been convicted of a felony or misdemeanor under any state or federal law relating to any dangerous drug;

(3) Has violated any provision of this article or the rules and regulations promulgated under this article; or

(4) Has failed to maintain sufficient controls against diversion of dangerous drugs into other than legitimate medical, scientific, or industrial channels.

(b) The State Board of Pharmacy may limit revocation or suspension of a permit to the particular dangerous drug with respect to which grounds for revocation or suspension exist.

(c) Instead of suspending or revoking a permit as authorized by subsection (a) or (b) of this Code section, the State Board of Pharmacy may impose a fine in an amount not to exceed \$1,500.00.

(d) If the State Board of Pharmacy suspends or revokes a permit, all dangerous drugs owned or possessed by the permittee at the time of suspension or the effective date of the revocation order shall be placed under seal. No disposition may be made of drugs under seal until the time for taking an appeal has elapsed or until all appeals have been concluded unless a court, upon application therefor, orders the sale of perishable drugs and the deposit of the proceeds of the sale with the court. Upon a revocation order becoming final, all dangerous drugs shall be forfeited to the state. (Code 1981, § 16-13-72.1, enacted by Ga. L. 1986, p. 421, § 1; Ga. L. 1999, p. 81, § 16.)

16-13-73. Labeling prescription containers of dangerous drugs.

(a) Whenever a pharmacist dispenses a dangerous drug, he shall, in each case, place upon the container the following information:

- (1) Name of the patient;
- (2) Name of the physician prescribing the drug;
- (3) The expiration date, if any, of the drug;
- (4) Name and address of the pharmacy from which the drug was dispensed; and
- (5) The date of the prescription.

(b) Any pharmacist who dispenses a dangerous drug and fails to place the label required by subsection (a) of this Code section upon the container of such drug shall be guilty of a misdemeanor. (Ga. L. 1939, p. 288, § 3; Code 1933, §§ 79A-705, 79A-9908, enacted by Ga. L. 1967, p. 296, § 1; Ga. L. 1971, p. 406, § 1; Ga. L. 1989, p. 14, § 16.)

RESEARCH REFERENCES

C.J.S. — 28 C.J.S., Drugs and Narcotics, §§ 103, 104, 135 et seq.

ALR. — Constitutionality of statutes

requiring notice by label or otherwise of the fact that product is imported, or as to place of production, 124 ALR 572.

16-13-74. Written prescriptions for dangerous drugs; content; signature.

(a) All written prescription drug orders for dangerous drugs shall be dated as of, and be signed on, the date when issued and shall bear the name and address of the patient, together with the name and strength of the drug, the quantity to be dispensed, complete directions for administration, the printed name, address, and telephone number of the practitioner, and the number of permitted refills. A prescription drug order for a dangerous drug is not required to bear the DEA permit number of the prescribing practitioner. A prescription drug order for a dangerous drug may be prepared by the practitioner or the practitioner's agent. The practitioner's signature must appear on each prescription prepared by the practitioner or the practitioner's agent and the nature of the practitioner's signature must meet the guidelines set forth in Chapter 4 of Title 26, the regulations promulgated by the State Board of Pharmacy, or both such guidelines and regulations. Any practitioner who shall dispense dangerous drugs shall comply with the provisions of Code Section 16-13-73.

(b) Any practitioner of the healing arts who fails to comply with subsection (a) of this Code section shall be guilty of a misdemeanor. (Ga. L. 1939, p. 288, § 4; Code 1933, §§ 79A-706, 79A-9909, enacted by Ga. L. 1967, p. 296, § 1; Ga. L. 1982, p. 2403, §§ 9, 21; Ga. L. 2003, p. 349, § 12.)

RESEARCH REFERENCES

C.J.S. — 28 C.J.S., Drugs and Narcotics, §§ 103, 104, 135

16-13-75. Drugs to be kept in original container; exception.

(a) Possession and control of controlled substances or dangerous drugs by anyone other than the individuals specified in Code Section 16-13-35 or 16-13-72 shall be legal only if such drugs are in the original container in which they were dispensed by the pharmacist or the practitioner of the healing arts and are labeled according to Code Section 26-3-8.

(b) The possession, filling, and use of canisters for remote automated medication systems pursuant to subsection (i) of Code Section 16-13-41 shall not be considered a violation of this Code section. (Ga. L. 1939, p. 288, § 5; Code 1933, § 79A-707, enacted by Ga. L. 1967, p. 296, § 1; Ga. L. 1996, p. 356, § 7; Ga. L. 2011, p. 308, § 3/HB 457.)

The 2011 amendment, effective May 11, 2011, designated the existing provisions of the Code section as subsection (a); and added subsection (b).

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, “Code Section 16-13-35” was substituted for “Code Sections 16-13-35” (now subsection (a)).

JUDICIAL DECISIONS

Cited in Thackston v. State, 178 Ga. App. 408, 343 S.E.2d 171 (1986); Black v. State, 194 Ga. App. 660, 391 S.E.2d 432 (1990).

RESEARCH REFERENCES

ALR. — Construction of provision of Uniform Narcotic Drug Act requiring a physician’s prescription as a prerequisite to a pharmacist’s sale of narcotics, 10 ALR3d 560.

16-13-76. Use of fictitious name or false address when obtaining drugs.

No person shall obtain or attempt to obtain any dangerous drug by use of a fictitious name or by the giving of a false address. (Ga. L. 1939, p. 288, § 5; Code 1933, § 79A-708, enacted by Ga. L. 1967, p. 296, § 1.)

JUDICIAL DECISIONS

Cited in Lillard v. State, 173 Ga. App. 293, 325 S.E.2d 903 (1985).

RESEARCH REFERENCES

C.J.S. — 28 C.J.S., Drugs and Narcotics, § 269.

16-13-77. Applicability of article to practitioner of the healing arts.

Nothing in this article shall be construed to prohibit the administration of dangerous drugs by or under the direction of a practitioner of the healing arts. (Code 1933, § 79A-704, enacted by Ga. L. 1967, p. 296, § 1.)

Cross references. — Further provisions regarding applicability of article to practitioners of healing arts, § 26-4-130.

16-13-78. Obtaining or attempting to obtain dangerous drugs by fraud, forgery, or concealment of material fact.

(a) No person shall obtain or attempt to obtain any dangerous drug or attempt to procure the administration of any such drug by:

- (1) Fraud, deceit, misrepresentation, or subterfuge;

(2) The forgery or alteration of any prescription or of any written order;

(3) The concealment of a material fact; or

(4) The use of a false name or the giving of a false address.

(b) Any person violating subsection (a) of this Code section shall be guilty of a misdemeanor.

(c) Nothing in this Code section shall apply to drug manufacturers or their agents or employees when such manufacturers or their agents or employees are authorized to engage in and are actually engaged in investigative activities directed toward the safeguarding of the manufacturer's trademark. (Code 1933, § 79A-9910, enacted by Ga. L. 1967, p. 296, § 1; Ga. L. 1970, p. 461, § 1.)

JUDICIAL DECISIONS

Failure of evidence to sustain conviction. — When the defendant was indicted for obtaining or attempting to obtain "dangerous drugs" by fraud, forgery, or concealment of a material fact, but the drugs were actually "Halcion" and "Lortab," both controlled substances, conviction of the defendant for violations involving controlled substances was not

supported by the evidence because it was for a different offense than originally charged and the trial court erred in failing to direct a verdict of acquittal. *Tibbs v. State*, 211 Ga. App. 250, 438 S.E.2d 706 (1993).

Cited in *Gieger v. Hopper*, 232 Ga. 408, 207 S.E.2d 41 (1974); *Rosenbaum v. Dunn*, 136 Ga. App. 870, 222 S.E.2d 596 (1975).

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Drugs and Controlled Substances, §§ 187, 189, 195, 196.

C.J.S. — 28 C.J.S., Drugs and Narcotics, § 169.

ALR. — Procuring signature by fraud as forgery, 11 ALR3d 1074.

Construction of provision of Uniform Narcotic Drug Act or similar statute dealing with obtaining or procuring the ad-

ministration of a narcotic drug by fraud or deceit, 25 ALR3d 1118.

Marijuana, psilocybin, peyote, or similar drugs of vegetable origin as narcotics for purposes of drug prosecution, 50 ALR3d 1164.

LSD, STP, MDA, or other chemically synthesized hallucinogenic or psychedelic substances as narcotics for purposes of drug prosecution, 50 ALR3d 1284.

16-13-78.1. Prescribing or ordering dangerous drugs.

(a) No person shall prescribe or order the dispensing of a dangerous drug, except a registered practitioner who is:

(1) Licensed or otherwise authorized by this state to prescribe dangerous drugs;

(2) Acting in the usual course of his professional practice; and

(3) Prescribing or ordering such dangerous drug for a legitimate medical purpose.

(b) Any person violating subsection (a) of this Code section shall be guilty of a misdemeanor. (Code 1981, § 16-13-78.1, enacted by Ga. L. 1985, p. 1219, § 10.)

OPINIONS OF THE ATTORNEY GENERAL

Nurses may not write or telephone in prescriptions by referring to a written protocol. 1988 Op. Att'y Gen. No. 88-9.

16-13-78.2. Possession, manufacture, delivery, distribution, or sale of counterfeit substances.

Except as authorized by this article, it is unlawful for any person to possess, have under his control, manufacture, deliver, distribute, dispense, administer, sell, or possess with intent to distribute a counterfeit substance. Any person who violates this Code section shall be guilty of a misdemeanor. (Code 1981, § 16-13-78.2, enacted by Ga. L. 1985, p. 1219, § 11.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1985, the term "subsection" in the second sentence of this

Code section was changed to "Code section."

JUDICIAL DECISIONS

Evidence in other prosecutions. — In a proceeding against defendant for possession of cocaine, the trial court erred in admitting similar transaction evidence of defendant's possession of counterfeit co-

caine when defendant was not given notice of the state's intent to introduce evidence of that crime. *Crawford v. State*, 230 Ga. App. 568, 497 S.E.2d 45 (1998).

16-13-79. Violations.

(a) Except as provided in subsections (b), (c), and (d) of this Code section, any person who violates this article shall be guilty of a misdemeanor.

(b) Any person who distributes or possesses with the intent to distribute nitrous oxide for any use other than for a medical treatment prescribed by the order of a licensed medical practitioner, except as provided for by paragraph (16) of subsection (c) of Code Section 16-13-71, shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not less than one year nor more than three years or by a fine not to exceed \$5,000.00 or both.

(c) Any person who distributes or possesses with the intent to distribute to any person under 18 years of age nitrous oxide for any use other than for a medical treatment prescribed by the order of a licensed medical practitioner, except as provided for by paragraph (16) of

subsection (c) of Code Section 16-13-71, shall be guilty of a felony and upon conviction thereof shall be punished for not less than two years nor more than six years or by a fine not to exceed \$10,000.00 or both.

(d) This article shall not apply to any person who possesses, distributes, sells, or uses nitrous oxide for food preparation in a restaurant, for food service, or in household products. (Code 1933, § 79A-9907, enacted by Ga. L. 1967, p. 296, § 1; Ga. L. 1989, p. 238, § 2; Ga. L. 1991, p. 312, § 4; Ga. L. 1996, p. 356, § 8; Ga. L. 1998, p. 778, § 7; Ga. L. 2008, p. 169, § 9/HB 1090.)

Cross references. — Fine or forfeiture for violations which are grounds for revocation of dangerous drug permit, § 16-13-72.1.

Law reviews. — For survey article on

criminal law and procedure, see 34 Mercer L. Rev. 89 (1982).

For note on 1989 amendment to this Code section, see 6 Georgia St. U.L. Rev. 204 (1989).

JUDICIAL DECISIONS

Cited in Black v. State, 194 Ga. App. 660, 391 S.E.2d 432 (1990).

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Drugs and Controlled Substances, §§ 187, 189, 195, 196.

C.J.S. — 28A C.J.S., Drugs and Narcotics, § 342 et seq.

ALR. — Marijuana, psilocybin, peyote, or similar drugs of vegetable origin as

narcotics for purposes of drug prosecution, 50 ALR3d 1164.

LSD, STP, MDA, or other chemically synthesized hallucinogenic or psychedelic substances as narcotics for purposes of drug prosecution, 50 ALR3d 1284.

ARTICLE 4

SALE, POSSESSION, TRANSFER, OR INHALATION OF MODEL GLUE

RESEARCH REFERENCES

ALR. — Penal offense of sniffing glue or similar volatile intoxicants, 32 ALR3d 1438.

Products liability: recovery for injury or

death resulting from intentional inhalation of product's fumes or vapors to produce intoxicating or similar effect, 50 ALR5th 275.

16-13-90. "Model glue" defined.

As used in this article, the term "model glue" means any glue, cement, solvent, or chemical substance containing one or more of the following chemicals: acetone, amyl chloride (iso- and tertiary), benzene, carbon disulfide, carbon tetrachloride, chloroform, ether, ethyl acetate, ethyl alcohol, ethylene dichloride, isopropyl acetate, isopropyl alcohol,

isopropyl ether, methyl acetate, methyl alcohol, propylene dichloride, propylene oxide, trichlorethylene, amyl acetate, amyl alcohol, butyl acetate, butyl alcohol, butyl ether, diethylcarbonate, diethylene oxide (dioxane), dipropyl ketone, ethyl butyrate, ethylene glycol monoethyl ether (cellosolve), ethylene glycol monomethyl ether acetate (methyl cellosolve acetate), isobutyl alcohol, methyl amyl acetate, methyl amyl alcohol, methyl isobutyl ketone, or toluene. (Ga. L. 1968, p. 1194, § 2; Ga. L. 1983, p. 3, § 13.)

JUDICIAL DECISIONS

Butane not listed. — Trial court properly granted summary judgment in favor of a drug store in a wrongful death suit brought by the parents of a teenager who died while huffing butane and in a suit brought by the parents of two other teens who were injured since: the teens assumed the risk; the expert's affidavit presented by the parents was not based on personal knowledge from interviewing the teens and was conclusory and speculative; to the extent that the expert's affidavit fit within O.C.G.A. § 24-9-67, the expert's generalizations about the beliefs of adolescents about death or the propensity of

adolescents to exercise poor judgment and behave irresponsibly were not appropriate yardsticks for assessing the minors' knowledge of the risk; the parents' claim that the drug store knew that the teens were going to misuse the butane was based on hearsay; and the parents' public policy claims were rejected as O.C.G.A. § 16-13-90 created a list of dangerous substances not to be sold to minors, butane was not on the list, and any change in the law had to be legislatively enacted. *Garner v. Rite Aid of Ga., Inc.*, 265 Ga. App. 737, 595 S.E.2d 582 (2004).

OPINIONS OF THE ATTORNEY GENERAL

City may not adopt ordinance prohibiting glue sniffing, already de-

nounced by state statute. 1970 Op. Att'y Gen. No. U70-59.

16-13-91. Intentional inhalation of model glue; application of article to anesthesia.

No person shall, for the purpose of causing a condition of intoxication, stupefaction, euphoria, excitement, exhilaration, or dulling of the senses or nervous system, intentionally smell or inhale the fumes from any model glue, provided that this Code section shall not apply to the inhalation of any anesthesia for medical or dental purposes. (Ga. L. 1968, p. 1194, § 1.)

JUDICIAL DECISIONS

Evidence of violation. — Spray paint containing acetone was within the definition of model glue and evidence of the defendant's possession was sufficient to support an adjudication of delinquency for having inhaled model glue. *In re T.S.*, 211 Ga. App. 46, 438 S.E.2d 159 (1993).

Presence of toluene in spray paint, an essential element of the crime, was not proven because the contents label was hearsay and, absent a recognized exception, could not prove the truth of the matter asserted. *Ledford v. State*, 239 Ga. App. 237, 520 S.E.2d 225 (1999).

OPINIONS OF THE ATTORNEY GENERAL

City may not adopt ordinance prohibiting glue sniffing, already de-nounced by state statute. 1970 Op. Att’y Gen. No. U70-59.

16-13-92. Possession, sale, or transfer of model glue.

No person shall intentionally possess, buy, sell, transfer possession, or receive possession of any model glue for the purpose of violating or aiding another person to violate this article. (Ga. L. 1968, p. 1194, § 3.)

16-13-93. Sale or transfer of model glue to minors.

No person shall sell or transfer possession of any model glue to another person under 18 years of age, nor shall any person under 18 years of age possess or buy any model glue unless the purchase is for model building or other lawful use and the person under 18 years of age has in his possession and exhibits to the seller or transferor the written consent of his parent or legal guardian to make such purchase or take possession of the model glue, provided any minor who shall transfer possession of model glue to another minor for model building or other lawful purpose shall not be held criminally liable for failing to require exhibition of the written consent of the transferee-minor’s parents or for failing to keep same available for inspection by law enforcement officials. (Ga. L. 1968, p. 1194, § 4.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1988, a hyphen was deleted between the words “law enforcement” near the end of the Code section.

16-13-94. Maintenance of records of sales to minors.

The person making a sale or transfer of possession of model glue to a person under 18 years of age must require the purchaser to exhibit the written consent of his parent or guardian and the name and address of the consenting parent or guardian. All data required by this Code section shall be kept available by the seller for inspection by law enforcement officials for a period of six months. (Ga. L. 1968, p. 1194, § 5.)

16-13-95. Effect of article on laws or ordinances of counties and municipalities.

No provisions in this article shall be construed to repeal or limit laws or ordinances of the governing authority of any county or municipality regulating, restricting, or prohibiting the sale of model glue to any person under the age of 18, nor shall this article restrict the governing authority of any county or municipality from enacting ordinances or

regulations governing the regulation of model glue not inconsistent with this article. (Ga. L. 1968, p. 1194, § 7.)

16-13-96. Penalty for violation of article; separate offenses.

Any person who violates this article shall be guilty of a misdemeanor. Each violation of this article shall be deemed a separate and distinct offense. (Ga. L. 1968, p. 1194, § 6.)

OPINIONS OF THE ATTORNEY GENERAL

City may not adopt ordinance prohibiting glue sniffing, already denounced by state statute. 1970 Op. Att'y Gen. No. U70-59.

RESEARCH REFERENCES

ALR. — Penal offense of sniffing glue or similar volatile intoxicants, 32 ALR3d 1438.

ARTICLE 5

SANCTIONS AGAINST LICENSED PERSONS FOR OFFENSES INVOLVING CONTROLLED SUBSTANCES OR MARIJUANA

Law reviews. — For note on 1990 enactment of this article, see 7 Georgia St. U.L. Rev. 371 (1990).

16-13-110. Definitions.

(a) As used in this article, the term:

(1) "Controlled substance" means any drug, substance, or immediate precursor included in the definition of the term "controlled substance" in paragraph (4) of Code Section 16-13-21.

(2) "Convicted" or "conviction" refers to a final conviction in a court of competent jurisdiction, or the acceptance of a plea of guilty or nolo contendere or affording of first offender treatment by a court of competent jurisdiction.

(3) "Licensed individual" means any individual to whom any department, agency, board, bureau, or other entity of state government has issued any license, permit, registration, certification, or other authorization to conduct a licensed occupation.

(4) "Licensed occupation" means any occupation, profession, business, trade, or other commercial activity which requires for its lawful conduct the issuance to an individual of any license, permit, regis-

tration, certification, or other authorization by any department, agency, board, bureau, or other entity of state government.

(5) "Licensing authority" means any department, agency, board, bureau, or other entity of state government which issues to individuals any license, permit, registration, certification, or other authorization to conduct a licensed occupation.

(6) "Marijuana" means any substance included in the definition of the term "marijuana" in paragraph (16) of Code Section 16-13-21.

(b) Without limiting the generality of the provisions of subsection (a) of this Code section, the practice of law shall constitute a licensed occupation for purposes of this article and the Supreme Court of Georgia shall be the licensing authority for the practice of law. (Code 1981, § 16-13-110, enacted by Ga. L. 1990, p. 2009, § 1.)

16-13-111. Notification of conviction of licensed individual to licensing authority; reinstatement of license; imposition of more stringent sanctions.

(a) Any licensed individual who is convicted under the laws of this state, the United States, or any other state of any criminal offense involving the manufacture, distribution, trafficking, sale, or possession of a controlled substance or marijuana shall notify the appropriate licensing authority of the conviction within ten days following the conviction.

(b) Upon being notified of a conviction of a licensed individual, the appropriate licensing authority shall suspend or revoke the license, permit, registration, certification, or other authorization to conduct a licensed occupation of such individual as follows:

(1) Upon the first conviction, the licensed individual shall have his or her license, permit, registration, certification, or other authorization to conduct a licensed occupation suspended for a period of not less than three months; provided, however, that in the case of a first conviction for a misdemeanor the licensing authority shall be authorized to impose a lesser sanction or no sanction upon the licensed individual; and

(2) Upon the second or subsequent conviction, the licensed individual shall have his or her license, permit, registration, certification, or other authorization to conduct a licensed occupation revoked.

(c) The failure of a licensed individual to notify the appropriate licensing authority of a conviction as required in subsection (a) of this Code section shall be considered grounds for revocation of his or her license, permit, registration, certification, or other authorization to conduct a licensed occupation.

(d) A licensed individual sanctioned under subsection (b) or (c) of this Code section may be entitled to reinstatement of his or her license, permit, registration, certification, or other authorization to conduct a licensed occupation upon successful completion of a drug abuse treatment and education program approved by the licensing authority.

(e) The suspension and revocation sanctions prescribed in this Code section are intended as minimum sanctions, and nothing in this Code section shall be construed to prohibit any licensing authority from establishing and implementing additional or more stringent sanctions for criminal offenses and other conduct involving the unlawful manufacture, distribution, trafficking, sale, or possession of a controlled substance or marijuana. (Code 1981, § 16-13-111, enacted by Ga. L. 1990, p. 2009, § 1.)

Administrative rules and regulations. — Substantive regulations, Official Compilation of the Rules and Regulations

of the State of Georgia, Georgia Real Estate Appraisers Board, Chapter 539-1.

16-13-112. Applicability of administrative procedures.

Administrative procedures for the implementation of this article for each licensed occupation shall be governed by the appropriate provisions applicable to each licensing authority. (Code 1981, § 16-13-112, enacted by Ga. L. 1990, p. 2009, § 1.)

16-13-113. Article as supplement to power of licensing authority.

The provisions of this article shall be supplemental to and shall not operate to prohibit any licensing authority from acting pursuant to those provisions of law which may now or hereafter authorize other sanctions and actions for that particular licensing authority. (Code 1981, § 16-13-113, enacted by Ga. L. 1990, p. 2009, § 1.)

16-13-114. Period of applicability of article.

This article shall apply only with respect to criminal offenses committed on or after July 1, 1990; provided, however, that nothing in this Code section shall prevent any licensing authority from implementing sanctions additional to or other than those provided for in this article with respect to offenses committed prior to July 1, 1990. (Code 1981, § 16-13-114, enacted by Ga. L. 1990, p. 2009, § 1.)

CHAPTER 14

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

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| Sec. | | Sec. | |
| 16-14-1. | Short title. | 16-14-10. | Recognition and enforcement of judgments of other states; reciprocal agreements with other states. |
| 16-14-2. | Findings and intent of General Assembly. | 16-14-11. | Venue. |
| 16-14-3. | Definitions. | 16-14-12. | Cases of special public importance. |
| 16-14-4. | Prohibited activities. | 16-14-13. | Filing and attachment of lien notice. |
| 16-14-5. | Criminal penalties for violation of Code Section 16-14-4. | 16-14-14. | Term of lien notice; release, extinguishment, or termination. |
| 16-14-6. | Available civil remedies. | 16-14-15. | Acquisition of record of real property by alien corporation. |
| 16-14-7. | Forfeiture proceedings. | | |
| 16-14-8. | Period of limitations as to criminal or civil proceedings under this chapter. | | |
| 16-14-9. | Civil remedies as supplemental and not mutually exclusive. | | |

Cross references. — Organized Crime Prevention Council, T. 35, C. 7.

Law reviews. — For article, "Georgia Racketeer Influenced & Corrupt Organizations Act," see 20 Ga. St. B.J. 34 (1983). For article, "Private Rico Litigation Based Upon Fraud in the Sale of Securities," see 18 Ga. L. Rev. 43 (1983). For article, "The Money Laundering Control Act of 1986: Will Attorneys Be Taken to The Cleaners?," see 24 Ga. St. B.J. 186 (1988). For article, "Georgia's Baby RICO Comes of

Age," see 25 Ga. St. B.J. 153 (1989). For article on the Traps of Federal and Georgia Rico, see 28 Ga. St. B.J. 134 (1992). For annual survey article on the law of torts, see 45 Mercer L. Rev. 403 (1993). For annual survey article discussing developments in construction law, see 51 Mercer L. Rev. 181 (1999).

For comment, "The Pattern Requirement of Civil RICO: *H. J. Inc. v. Northwestern Bell Telephone Co.*," see 7 Georgia St. U.L. Rev. 111 (1990).

JUDICIAL DECISIONS

Sufficient showing of predicate facts. — Testimony by defendant's cousin that the cousin saw defendant deliver packages to defendant's mother on several occasions corroborated defendant's mother's testimony that defendant supplied cocaine for sale by family members and was sufficient to sustain defendant's conviction under the Georgia Racketeer Influenced and Corrupt Organization Act, O.C.G.A. § 16-14-1 et seq. *McGee v. State*, 255 Ga. App. 708, 566 S.E.2d 431 (2002), cert. denied, 537 U.S. 1058, 123 S. Ct. 633, 154 L. Ed. 2d 539 (2002).

Insufficient showing of predicate acts. — Predicate acts alleged by plain-

tiffs were so vaguely and ambiguously recited as to fail to demonstrate even a factual relationship to one another, much less a threat of continuing activity. The plaintiff failed to satisfy the pattern-of-activity element by failing to allege facts sufficient to fulfill the "continuity plus relationship" requirement between the predicate acts pleaded in the complaint. *Mills v. Fitzgerald*, 668 F. Supp. 1554 (N.D. Ga. 1987).

Defendant, county school superintendent, correctly argued that trial court erred in denying defendant's motion for directed verdict as to two predicate acts of theft by taking committed by defendant's

two assistants because insufficient evidence was presented from which the jury could find defendant guilty of these two acts. *Purvis v. State*, 208 Ga. App. 653, 433 S.E.2d 58 (1993).

Cited in *Western Bus. Sys. v. Slaton*, 492 F. Supp. 513 (N.D. Ga. 1980); *Western*

Bus. Sys. v. Slaton, 502 F. Supp. 746 (N.D. Ga. 1980); *Stamps v. Ford Motor Co.*, 650 F. Supp. 390 (N.D. Ga. 1986); *Dover v. State*, 195 Ga. App. 507, 393 S.E.2d 760 (1990); *Moore v. Barge*, 210 Ga. App. 552, 436 S.E.2d 746 (1993); *Marshall v. City of Atlanta*, 195 Bankr. 156 (N.D. Ga. 1996).

RESEARCH REFERENCES

Am. Jur. 2d. — 31A Am. Jur. 2d, Extortion, Blackmail and Threats, § 107 et seq.

Am. Jur. Proof of Facts. — “Pattern of Racketeering Activity” Under the Racketeer Influenced and Corrupt Organizations Act (RICO), 10 POF3d 289.

C.J.S. — 15 C.J.S., Commerce, §§ 136 et seq., 147.

ALR. — Civil action for damages under state Racketeer Influenced and Corrupt Organizations Act (RICO) for losses from racketeering activity, 62 ALR4th 654.

Recovery of damages for personal injuries in civil action for damages under Racketeer Influenced and Corrupt Orga-

nizations Act (18 USCS § 1964(c)), 96 ALR Fed. 881.

Liability, under Racketeer Influenced and Corrupt Organizations Act (RICO) (18 USCS §§ 1961-1968), for retaliation against employee for disclosing or refusing to commit wrongful act, 100 ALR Fed. 667.

Construction and application of § 2J1.3 of United States sentencing guidelines (18 USCS Appx 1.3 § 2J), pertaining to sentencing for perjury, subornation of perjury, witness bribery, and departures therefrom, 131 ALR Fed. 269.

16-14-1. Short title.

This chapter shall be known and may be cited as the “Georgia RICO (Racketeer Influenced and Corrupt Organizations) Act.” (Code 1933, § 26-3401, enacted by Ga. L. 1980, p. 405, § 1.)

Law reviews. — For survey article on trial practice and procedure, see 59 Mercer L. Rev. 423 (2007). For survey article

on tort law, see 60 Mercer L. Rev. 375 (2008).

JUDICIAL DECISIONS

Proof of theft by deception as predicate act. — Civil fraud and theft by deception have different elements and showing that there are jury issues as to fraud does not necessarily show that there are jury issues as to theft by deception; a failure to show the level of intent needed for proving theft by deception would preclude a jury issue on that crime as a predicate act for RICO purposes, defeating a RICO claim. *Avery v. Chrysler Motors Corp.*, 214 Ga. App. 602, 448 S.E.2d 737 (1994).

Unconstitutionality of in personam forfeiture proceeding. — In an in personam forfeiture proceeding, pursuant

to the Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-7(m), a trial court erred by finding that the civil procedural rules set forth in the Georgia Civil Practice Act, O.C.G.A. § 9-11-1 et seq., were an adequate substitute for the substantive constitutional rights to which the property owners were entitled. As a result, the Supreme Court of Georgia held that § 16-14-7(m) was unconstitutional because the law deprived in personam forfeiture defendants of the safeguards of criminal procedure guaranteed by the United States and Georgia Constitutions. *Cisco v. State*, 285 Ga. 656, 680 S.E.2d 831 (2009).

Preponderance of evidence required. — Trial court erred in a bifurcated suit asserting a claim of illegal insurance sales under the Georgia Racketeer Influenced and Corrupt Organizations Act (Georgia RICO), O.C.G.A. § 16-14-1 et seq., by instructing the jury that the suing passenger of a cab was required to prove the asserted Georgia RICO claims against two cab companies by clear and convincing evidence as the proper standard of proof to have been applied was a preponderance of the evidence. *Am. Ass'n of Cab Cos. v. Parham*, 291 Ga. App. 33, 661 S.E.2d 161 (2008), cert. denied, 2008 Ga. LEXIS 690, 728 (Ga. 2008).

Amended complaint alleging violation of Georgia RICO Act granted. — In an action in which an interexchange carrier asserted it was not obligated to pay fees to a local carrier for misrepresented toll-free cell calls, its amendment to add claims alleging violations under the Georgia RICO Act, O.C.G.A. § 16-14-1 et seq., common law fraud, and the Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., was not futile given the court's denial of summary judgment on the local carrier's counterclaims; thus, amendment under Fed. R. Civ. P. 15 was granted. *ITC Deltacom Communs. v. US LEC Corp.*, No. 3:02-CV-116-JTC, 2004 U.S. Dist. LEXIS 27557 (N.D. Ga. Mar. 15, 2004).

Action against transferee of franchise failed. — Trial court erred by failing to grant a succeeding franchisee's motion for summary judgment in a fraud suit brought by car dealership consumers as the consumers failed to establish the succeeding franchisee's participation or involvement in any of the complained of transactions; thus, no unfair business violations were established, and no direct claim against a transferee was permitted under the Bulk Transfer Act, O.C.G.A. § 11-6-101 et seq. Additionally, the consumers' claims under Georgia's Racketeer Influenced and Corrupt Organizations statute, O.C.G.A. § 16-14-1 et seq., likewise failed since the uncontroverted evidence established without question that the succeeding franchisee did not make any misrepresentations to the consumers

nor participated in any of the transactions that formed the basis of the consumers' claims. *Summit Auto. Group, LLC v. Clark Kia Motors Ame., Inc.*, 298 Ga. App. 875, 681 S.E.2d 681 (2009).

RICO claim against non-debtor defendants not property of bankruptcy estate. — Bankruptcy court properly lifted the automatic stay so that a creditor could pursue a Georgia Racketeer Influenced and Corrupt Organizations Act (Georgia RICO), O.C.G.A. § 16-14-1, -6, action against the non-debtor defendants because the trustee was barred by the doctrine of *in pari delicto* from asserting a Georgia RICO claim against the non-debtor defendants, so the creditor's Georgia RICO claim against the non-debtor defendants was not property of the bankruptcy estate under 11 U.S.C. § 541(a); further, because the Georgia RICO claim was neither actual nor potential property of the bankruptcy estate, 11 U.S.C. § 544 did not authorize the trustee to bring such a claim against the non-debtor defendants. *Flatau v. Stewart* (In re Stewart), 339 B.R. 524 (M.D. Ga. 2006).

Claim against insurer not moot. — Conclusion that the insured party's claims alleging fraud, breach of contract, and violations of the Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq., were rendered moot by application of the appraisal clause was contrary to law; this would have converted the appraisal clause into an arbitration clause, which would have been impermissible under O.C.G.A. § 9-9-2(c)(3) in contracts between insured parties and insurers. *McGowan v. Progressive Preferred Ins. Co.*, 281 Ga. 169, 637 S.E.2d 27 (2006).

Failure to establish claims upon which racketeering claims were predicated. — Because a contractor failed to establish claims of fraud and conversion upon which the contractor's racketeering claims were predicated, the contractor's racketeering claims failed as a matter of law. *J. Kinson Cook of Ga., Inc. v. Heery/Mitchell*, 284 Ga. App. 552, 644 S.E.2d 440 (2007).

Plaintiff mortgage company's motion to remand the company's action to state

court was granted because the company's assertion of violations of federal criminal law as predicate acts to a Georgia RICO Act claim were not sufficiently substantial to confer federal question jurisdiction. *Neighborhood Mortg., Inc. v. Fegans*, 2007 U.S. Dist. LEXIS 63241 (N.D. Ga. Aug. 28, 2007).

Plaintiff subcontractor's Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq., claims against defendants, plaintiff's supplier, a competitor, and a government procuring agent, based on wire fraud, mail fraud, and Hobbs Act violations failed on causation since a fraud in bids to the government did not proximately cause the injury the subcontractor sustained by being at a competitive disadvantage. *G&G TIC, LLC v. Ala. Controls, Inc.*, No. 08-15783, 2009 U.S. App. LEXIS 8723 (11th Cir. Apr. 24, 2009) (Unpublished).

Fifth Amendment claim denied. — Denial of an accused's motion for a protective order under O.C.G.A. § 9-11-26(c) was affirmed as the Fifth Amendment could not be used to justify a protective order to stay all discovery in the accused's civil forfeiture proceeding under O.C.G.A. § 16-14-7 pending the conclusion of the accused's criminal Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq., case; while the privilege against self-incrimination extends to answers creating a "real and appreciable" danger of establishing a link in the chain of evidence needed to prosecute, the trial court has to determine if the answers could incriminate the witness,

and if the trial court determines that the answers could not incriminate the witness, the witness has to testify or be subject to the court's sanction. *Chumley v. State of Ga.*, 282 Ga. App. 117, 637 S.E.2d 828 (2006).

Contracts and merger clauses. — While plaintiff borrower's complaint alleged an alleged tax-favorable loan was represented as long-term but defendant lenders called it after one year, all oral representations forming the basis of a Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq., claim merged into the contract by a merger clause and were not binding since the contract reserved a right to demand repayment annually. *Curtis Inv. Co., LLC v. Bayerische Hypo-Und Vereinsbank, AG*, No. 08-14401, 2009 U.S. App. LEXIS 17469 (11th Cir. Aug. 5, 2009) (Unpublished).

Cited in *Duracell, Inc. v. SW Consultants, Inc.*, 126 F.R.D. 571 (N.D. Ga. 1989); *Russell Corp. v. BancBoston Fin. Co.*, 209 Ga. App. 660, 434 S.E.2d 716 (1993); *Fryer v. Easy Money Title Pawn, Inc.*, 172 Bankr. 1020 (Bankr. S.D. Ga. 1994); *Conklin v. Zant*, 216 Ga. App. 357, 454 S.E.2d 159 (1995); *Security Life Ins. Co. of Am. v. Clark*, 273 Ga. 44, 535 S.E.2d 234 (2000); *Williams Gen. Corp. v. Stone*, 279 Ga. 428, 614 S.E.2d 758 (2005); *Great Am. Ins. Co. v. Davis* (In re Davis), No. A04-74475-REB, 2007 Bankr. LEXIS 3684 (Bankr. N.D. Ga. Sept. 20, 2007); *PricewaterhouseCoopers, LLP v. Bassett*, 293 Ga. App. 274, 666 S.E.2d 721 (2008); *Constantino v. Warren*, 285 Ga. 851, 684 S.E.2d 601 (2009).

RESEARCH REFERENCES

ALR. — Criminal prosecutions under state RICO statutes for engaging in organized criminal activity, 89 ALR5th 629.

Statute of limitations in civil actions for damages under the Racketeer Influence

and Corrupt Organizations Act (RICO), 18 USCA §§ 1961-1968, 156 ALR Fed. 361.

Validity, construction, and application of RICO Act, Supreme Court cases, 171 ALR Fed. 1.

16-14-2. Findings and intent of General Assembly.

(a) The General Assembly finds that a severe problem is posed in this state by the increasing sophistication of various criminal elements and

the increasing extent to which the state and its citizens are harmed as a result of the activities of these elements.

(b) The General Assembly declares that the intent of this chapter is to impose sanctions against those who violate this chapter and to provide compensation to persons injured or aggrieved by such violations. It is not the intent of the General Assembly that isolated incidents of misdemeanor conduct or acts of civil disobedience be prosecuted under this chapter. It is the intent of the General Assembly, however, that this chapter apply to an interrelated pattern of criminal activity motivated by or the effect of which is pecuniary gain or economic or physical threat or injury. This chapter shall be liberally construed to effectuate the remedial purposes embodied in its operative provisions. (Code 1933, § 26-3401, enacted by Ga. L. 1980, p. 405, § 1; Ga. L. 1997, p. 672, § 1.)

Editor's notes. — Ga. L. 1997, p. 672, § 2, not codified by the General Assembly, provides that the Act shall have retroactive application to the fullest extent permitted by the Constitutions of Georgia and the United States.

Law reviews. — For article, "A Comprehensive Analysis of Georgia RICO," see 9 Georgia St. U.L. Rev. 537 (1993). For article commenting on the 1997 amendment of this Code section, see 14 Georgia St. U.L. Rev. 90 (1997).

JUDICIAL DECISIONS

Not element of civil cause of action. — Expression of legislative purpose in enacting O.C.G.A. Ch. 14, T. 16 is not an element of a civil cause of action under the Georgia RICO Act, O.C.G.A. § 16-14-1 et seq. *State v. Shearson Lehman Bros.*, 188 Ga. App. 120, 372 S.E.2d 276 (1988).

O.C.G.A. Ch. 14, T. 16 requires the plaintiff to allege an organized crime nexus. *Georgia Gulf Corp. v. Ward*, 701 F. Supp. 1556 (N.D. Ga. 1987).

Allegations of enterprise and racketeering not necessary. — Plaintiff's failure to separately allege that defendants were engaged in an "enterprise" as well as a pattern of racketeering did not preclude issuance of a preliminary injunction against the defendants. *Cotton, Inc. v. Phil-Dan Trucking, Inc.*, 270 Ga. 95, 507 S.E.2d 730 (1998).

Nexus between organized crime and the economy. — Plaintiff's failure to allege a nexus between organized crime and the economy is of no consequence. *Cotton, Inc. v. Phil-Dan Trucking, Inc.*, 270 Ga. 95, 507 S.E.2d 730 (1998).

Securing debt. — Because the General Assembly did not intend to proscribe

a bank's attempts to secure payment of a debt through legal means, the trial court did not err in finding that the debtors failed to offer evidence of a pattern of racketeering to support a RICO claim. *All Fleet Refinishing, Inc. v. W. Ga. Nat'l Bank*, 280 Ga. App. 676, 634 S.E.2d 802 (2006).

Intent to cause harm. — Evidence sufficient to show a racketeer influenced and corrupt organization violation necessarily also demonstrates the "intent to cause harm" that removes the cap to a punitive damage award. *Speir v. Krieger*, 235 Ga. App. 392, 509 S.E.2d 684 (1998).

Credit company to which retail installment contract assigned. — Credit company to which automobile dealer assigned retail installment contract was not a member of the "organized criminal elements" at which the Georgia Racketeer Influenced and Corrupt Organization Act is aimed. *Doxie v. Ford Motor Credit Co.*, 603 F. Supp. 624 (S.D. Ga. 1984).

Repeated sale of non-existent insurance. — While the illegal sale of insurance is not in and of itself a basis for a racketeer influenced and corrupt organi-

zation (RICO) action absent further evidence of fraud rising to the level of theft by deception, the repeated sale to unsuspecting consumers of non-existent insurance was the very essence of such fraud and was exactly the type of criminally fraudulent activity masquerading as "business" that RICO was designed to address. *Speir v. Krieger*, 235 Ga. App. 392, 509 S.E.2d 684 (1998).

Preponderance of evidence standard in civil cases. — In a civil action under the Georgia RICO Act, O.C.G.A. § 16-14-1 et seq., given the similarities in the purpose and language of the federal and Georgia RICO statutes, together with the General Assembly's mandate to liberally construe the Act to effectuate its remedial purposes, under O.C.G.A. § 16-14-2(b), the applicable standard of

proof in state civil RICO actions was held to be a preponderance of the evidence; thus, the Supreme Court of Georgia overruled *Simpson Consulting, Inc. v. Barclays Bank PLC*, 227 Ga. App. 648 (490 SE2d 184) (1997), and those other cases holding to the contrary, specifically, *Blanton v. Bank of America*, 256 Ga. App. 103 (2002), *In re Copelan*, 250 Ga. App. 856 (2001), and *Tronitec, Inc. v. Shealy*, 249 Ga. App. 442 (2001). *Williams Gen. Corp. v. Stone*, 279 Ga. 428, 614 S.E.2d 758 (2005).

Cited in *Waller v. State*, 251 Ga. 124, 303 S.E.2d 437 (1983); *Five Star Partners v. Vincent Netherlands Properties*, 169 Bankr. 994 (Bankr. N.D. Ga. 1994); *Security Life Ins. Co. v. Clark*, 229 Ga. App. 593, 494 S.E.2d 388 (1997).

16-14-3. Definitions.

As used in this chapter, the term:

(1) "Alien corporation" means a corporation organized under laws other than the laws of the United States or the laws of any state of the United States.

(2)(A) "Beneficial interest" means either of the following:

(i) The interest of a person as a beneficiary under any other trust arrangement pursuant to which a trustee holds legal or record title to real property for the benefit of such person; or

(ii) The interest of a person under any other form of express fiduciary arrangement pursuant to which any other person holds legal or record title to real property for the benefit of such person.

(B) "Beneficial interest" does not include the interest of a stockholder in a corporation or the interest of a partner in either a general partnership or limited partnership. A beneficial interest shall be deemed to be located where the real property owned by the trustee is located.

(3) "Civil proceeding" means any civil proceeding commenced by an investigative agency under any provision of this chapter.

(4) "Criminal proceeding" means any criminal proceeding commenced by an investigative agency under any provision of this chapter.

(5) "Documentary material" means any book, paper, document, writing, drawing, graph, chart, photograph, phonorecord, magnetic

tape, computer printout, other data compilation from which information can be obtained or from which information can be translated into usable form, or other tangible item.

(6) "Enterprise" means any person, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this state, or other legal entity; or any unchartered union, association, or group of individuals associated in fact although not a legal entity; and it includes illicit as well as licit enterprises and governmental as well as other entities.

(7) "Investigative agency" means the Department of Law or the office of any district attorney.

(8) "Pattern of racketeering activity" means:

(A) Engaging in at least two acts of racketeering activity in furtherance of one or more incidents, schemes, or transactions that have the same or similar intents, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated incidents, provided at least one of such acts occurred after July 1, 1980, and that the last of such acts occurred within four years, excluding any periods of imprisonment, after the commission of a prior act of racketeering activity; or

(B) Engaging in any one or more acts of domestic terrorism as described in subsection (a) of Code Section 16-4-10 or any criminal attempt, criminal solicitation, or criminal conspiracy related thereto.

(9)(A) "Racketeering activity" means to commit, to attempt to commit, or to solicit, coerce, or intimidate another person to commit any crime which is chargeable by indictment under the following laws of this state:

(i) Article 2 of Chapter 13 of this title, relating to controlled substances;

(ii) Article 3 of Chapter 13 of this title, known as the "Dangerous Drugs Act";

(iii) Subsection (j) of Code Section 16-13-30, relating to marijuana;

(iv) Article 1 of Chapter 5 of this title, relating to homicide;

(v) Article 2 of Chapter 5 of this title, relating to bodily injury and related offenses;

(vi) Articles 3 and 4 of Chapter 7 of this title, relating to arson and destructive devices, respectively;

- (vii) Code Section 16-7-1, relating to burglary, or Code Section 16-7-2, relating to smash and grab burglary;
- (viii) Code Section 16-9-1, relating to forgery in the first degree;
- (ix) Article 1 of Chapter 8 of this title, relating to theft;
- (x) Article 2 of Chapter 8 of this title, relating to robbery;
- (xi) Code Sections 16-6-9 through 16-6-12 and 16-6-14, relating to prostitution and pandering;
- (xii) Code Section 16-12-80, relating to distributing obscene materials;
- (xiii) Code Section 16-10-2, relating to bribery;
- (xiv) Code Section 16-10-93, relating to influencing witnesses;
- (xv) Article 4 of Chapter 10 of this title and Code Sections 16-10-20, 16-10-23, and 16-10-91, relating to perjury and other falsifications;
- (xvi) Code Section 16-10-94, relating to tampering with evidence;
- (xvii) Code Section 16-12-22, relating to commercial gambling;
- (xviii) Code Section 3-3-27, relating to distilling or making liquors;
- (xix) Part 2 of Article 4 of Chapter 11 of this title, known as the “Georgia Firearms and Weapons Act”;
- (xx) Code Section 16-8-60, relating to unauthorized transfers and reproductions of recorded material;
- (xxi) Chapter 5 of Title 10, relating to violations of the “Georgia Uniform Securities Act of 2008”;
- (xxii) Code Section 3-3-27, relating to the unlawful distillation, manufacture, and transportation of alcoholic beverages;
- (xxiii) Code Sections 16-9-31, 16-9-32, 16-9-33, and 16-9-34, relating to the unlawful use of financial transaction cards;
- (xxiv) Code Section 40-3-90, relating to certain felonies involving certificates of title, security interest, or liens concerning motor vehicles;
- (xxv) Code Section 40-4-21, relating to removal or falsification of identification numbers;
- (xxvi) Code Section 40-4-22, relating to possession of motor vehicle parts from which the identification has been removed;

(xxvii) Code Section 16-9-70, relating to use of an article with an altered identification mark;

(xxviii) Article 6 of Chapter 9 of this title, known as the "Georgia Computer Systems Protection Act";

(xxix) Any conduct defined as "racketeering activity" under 18 U.S.C. Section 1961 (1)(A), (B), (C), and (D);

(xxx) Article 3 of Chapter 5 of this title, relating to kidnapping, false imprisonment, and related offenses, except for Code Section 16-5-44, relating to aircraft hijacking;

(xxxi) Code Section 16-11-37, relating to terroristic threats and acts;

(xxxii) Code Section 16-5-44.1, relating to motor vehicle hijacking;

(xxxiii) Code Section 16-10-32, relating to tampering with witnesses, victims, or informants;

(xxxiv) Code Section 16-10-97, relating to intimidation of grand or trial juror or court officer;

(xxxv) Article 11 of Chapter 1 of Title 7 and Sections 5311 through 5330 of Title 31 of the United States Code relating to records and reports of currency transactions;

(xxxvi) Article 8 of Chapter 9 of this title, relating to identity fraud, and Section 1028 of Title 18 of the United States Code, relating to fraudulent identification documents and information;

(xxxvii) Code Section 33-1-9, relating to insurance fraud;

(xxxviii) Code Section 16-17-2, relating to payday loans;

(xxxix) Code Section 16-9-101, relating to deceptive commercial e-mail; or

(xl) Code Section 16-8-102, relating to residential mortgage fraud.

(B) "Racketeering activity" shall also mean any act or threat involving murder, kidnapping, gambling, arson, robbery, theft, receipt of stolen property, bribery, extortion, obstruction of justice, dealing in narcotic or dangerous drugs, or dealing in securities which is chargeable under the laws of the United States or any of the several states and which is punishable by imprisonment for more than one year.

(10) "Real property" means any real property situated in this state or any interest in such real property, including, but not limited to, any lease of or mortgage upon such real property.

(11) “RICO lien notice” means the notice described in Code Section 16-14-13.

(12)(A) “Trustee” means either of the following:

(i) Any person who holds legal or record title to real property for which any other person has a beneficial interest; or

(ii) Any successor trustee or trustees to any of the foregoing persons.

(B) “Trustee” does not include the following:

(i) Any person appointed or acting as a guardian or conservator under Title 29, relating to guardian and ward, or personal representative under former Chapter 6 of Title 53 as such existed on December 31, 1997, relating to the administration of estates, if applicable, or Chapter 6 of Title 53 and other provisions in Chapter 1 through 11 of Title 53, the “Revised Probate Code of 1998,” relating to the administration of estates; or

(ii) Any person appointed or acting as a trustee of any testamentary trust or as trustee of any indenture of trust under which any bonds are or are to be issued. (Code 1933, § 26-3402, enacted by Ga. L. 1980, p. 405, § 1; Ga. L. 1982, p. 1385, §§ 2, 8; Ga. L. 1983, p. 3, § 13; Ga. L. 1984, p. 22, § 16; Ga. L. 1989, p. 14, § 16; Ga. L. 1990, p. 8, § 16; Ga. L. 1994, p. 1625, § 4; Ga. L. 1996, p. 416, § 8; Ga. L. 1998, p. 128, § 16, Ga. L. 1998, p. 270, § 7; Ga. L. 1999, p. 81, § 16; Ga. L. 2001, p. 858, § 1; Ga. L. 2002, p. 551, § 3; Ga. L. 2002, p. 1284, § 3; Ga. L. 2003, p. 387, § 1; Ga. L. 2004, p. 60, § 2; Ga. L. 2004, p. 161, § 4; Ga. L. 2005, p. 199, § 5/SB 62; Ga. L. 2005, p. 848, § 3/SB 100; Ga. L. 2006, p. 69, § 2/HB 804; Ga. L. 2008, p. 381, § 9/SB 358; Ga. L. 2010, p. 1147, § 8/HB 1104; Ga. L. 2011, p. 59, § 1-64/HB 415; Ga. L. 2011, p. 752, § 16/HB 142.)

The 2010 amendment, effective July 1, 2010, added “, or Code Section 16-7-2, relating to smash and grab burglary” at the end of division (9)(A)(vii).

The 2011 amendments. — The first 2011 amendment, effective July 1, 2011, substituted “trial juror” for “petit juror” in subdivision (9)(A)(xxxiv). The second 2011 amendment, effective May 13, 2011, part of an Act to revise, modernize, and correct the Code, redesignated division (9)(A)(xl) as division (9)(A)(xxxix) and division (9)(A)(xxxx) as division (9)(A)(xl); and, in division (12)(B)(i), substituted “under former Chapter 6 of Title 53 as such existed on December 31, 1997, relating to

the administration of estates, if applicable, or Chapter 6 of Title 53 and other provisions in Chapter 1 through 11 of Title 53, the ‘Revised Probate Code of 1998,’” for “under Chapter 6 of Title 53 of the ‘Pre-1998 Probate Code,’ relating to the administration of estates, if applicable, or Chapter 6 of Title 53 of the ‘Revised Probate Code of 1998’ and other provisions in such revised probate code”.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1999, divisions (9)(A)(xxiii) through (xxxv) were redesignated as divisions (9)(A)(xxxiii) through (xxxv).

Pursuant to Code Section 28-9-5, in

2005, “or” was deleted at the end of division (9)(A)(xxxviii), “; or” was substituted for a period at the end of division (9)(A)(xxxix), and division (9)(A)(xxxix), as enacted by Ga. L. 2005 p. 848, § 3, was redesignated as division (9)(A)(xxxx).

Editor’s notes. — Ga. L. 1994, p. 1625, § 1, not codified by the General Assembly, provides: “This Act shall be known and may be cited as the ‘Anti-motor Vehicle Hijacking Act of 1994’.”

Ga. L. 2001, p. 858, § 2, not codified by the General Assembly, provides that this Act shall apply with respect to a pattern of racketeering activity where at least one act of racketeering activity occurs on or after July 1, 2001. Prior law shall continue to apply with respect to a pattern of racketeering activity which does not include at least one act of racketeering activity occurring on or after July 1, 2001.

Ga. L. 2002, p. 1284, § 1, not codified by the General Assembly, provides: “This Act shall be known and may be cited as ‘Georgia’s Homeland Defense Act’.”

Ga. L. 2002, p. 1284, § 4, not codified by the General Assembly, provides, in part, that the provisions of this Act defining, redefining, or changing the punishment for crimes shall apply with respect to acts committed on or after May 16, 2002; and in these respects prior law shall continue to apply with respect to acts committed prior to May 16, 2002.

Ga. L. 2004, p. 161, § 16, not codified by the General Assembly, provides: “All appointments of guardians of the person or property made pursuant to former Title 29 shall continue in effect and shall thereafter be governed by the provisions of this Act.”

Ga. L. 2005, p. 199, § 1, not codified by the General Assembly, provides: “This Act shall be known and may be cited as the ‘Georgia Spam E-mail Act.’”

Ga. L. 2005, p. 199, § 2, not codified by the General Assembly, provides: “The General Assembly finds and declares that electronic mail has become an important and popular means of communication, relied on by millions of Georgians on a daily basis for personal and commercial purposes. The low cost and global reach of electronic mail make it convenient and efficient. Electronic mail serves as a cata-

lyst for economic development and frictionless commerce. The General Assembly further finds that the convenience and efficiency of electronic mail is threatened by an ever-increasing glut of deceptive commercial electronic mail. The senders of these electronic messages engage in a variety of fraudulent and deceptive practices to hide their identities, to disguise the true source of their electronic mail, and to evade the criminal and civil consequences of their actions. Deceptive commercial electronic mail imposes costs upon its ultimate recipients who are forced to receive, review, and delete unwanted messages and upon the electronic mail service providers forced to carry the messages. The General Assembly further finds that our state has a paramount interest in protecting its businesses and citizens from the deleterious effects of deceptive commercial electronic mail, including the impermissible shifting of cost and economic burden that results from the false and fraudulent nature of deceptive commercial electronic mail. Georgia’s enforcement of this interest imposes no additional burden upon the senders of such electronic mails in relation to the laws of any other state, in that such enforcement requires nothing more than the senders’ forbearance from active deception.”

Ga. L. 2005, p. 848, § 1, not codified by the General Assembly, provides: “The General Assembly finds and declares that fraud involving residential mortgages is at an all-time high in the United States and in Georgia. Mortgage lending institutions and borrowers have suffered hundreds of millions of dollars in losses due to residential mortgage fraud. Homeowners in neighborhoods plagued by mortgage fraud have witnessed the deterioration of their neighborhoods. Fraudulently inflated property values in their neighborhoods have resulted in substantial increases in property taxes. The General Assembly therefore concludes that for the protection of the general public, and particularly for the protection of borrowers, homeowners, lending institutions, and the integrity of the mortgage lending process, the ‘Georgia Residential Mortgage Fraud Act’ shall be enacted.”

Ga. L. 2011, p. 59, § 1, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Jury Composition Reform Act of 2011.'"

Law reviews. — For annual survey on criminal law and procedure, see 42 Mercer L. Rev. 141 (1990). For review of 1998 legislation relating to crimes and offenses, see 15 Georgia St. U.L. Rev. 80 (1998). For article on 2004 amendment of this Code

section, see 21 Georgia St. U.L. Rev. 59 (2004). For article on 2005 amendment of this Code section, see 22 Georgia St. U.L. Rev. 49 (2005).

For note on the 1994 amendment of this Code section, see 11 Georgia St. U.L. Rev. 99 (1994). For note on the 2002 amendment of this Code section, see 19 Georgia St. U.L. Rev. 95 (2002).

JUDICIAL DECISIONS

Constitutionality. — Paragraphs defining "enterprise" and "pattern of racketeering", O.C.G.A. § 16-14-3(6) and (8), are not unconstitutionally vague or overbroad. *Chancey v. State*, 256 Ga. 415, 349 S.E.2d 717 (1986), cert. denied, 481 U.S. 1029, 107 S. Ct. 1954, 95 L. Ed. 2d 527 (1987).

Federal jurisdiction. — Jurisdiction under 28 U.S.C. § 1331 did not exist in a borrower's suit asserting various claims against a lender and an appraiser in connection with a loan that encumbered the borrower's property with a debt that exceeded the property's value. Although the borrower alleged that the lender violated 18 U.S.C. §§ 1341, 1343 as predicate acts under O.C.G.A. § 16-14-3(9)(A) of Georgia's Racketeer Influenced and Corrupt Organizations (RICO) Act, that did not require the court to interpret the federal statutes; further, the borrower also asserted that the lender violated state statutes that could serve as predicate acts under Georgia's RICO law. *Austin v. Ameriquet Mortg. Co.*, 510 F. Supp. 2d 1218 (N.D. Ga. Feb. 27, 2007).

Legislative intent as to scope. — Legislature intended to subject to the coverage of the Racketeer Influenced Corrupt Organizations (RICO) statute two crimes, included in the statute as designated predicate acts, which are part of the same scheme, without the added burden of showing that defendant would continue the conduct or had been guilty of like conduct before the incidents charged as a RICO violation. *Dover v. State*, 192 Ga. App. 429, 385 S.E.2d 417 (1989).

Definition of pattern of racketeering satisfied. — Definition of a "pattern of racketeering activity" as set forth in

O.C.G.A. § 16-14-3(8) of "at least two incidents of racketeering activity that have the same or similar intents, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated incidents" was satisfied when the state established a number of interrelated incidents of racketeering activity that had the same intents and results (monetary gain) and the same accomplices (the defendants and other members of the group). *Overton v. State*, 295 Ga. App. 223, 671 S.E.2d 507 (2008), cert. denied, No. S09C0654, 2009 Ga. LEXIS 212 (Ga. 2009).

As a defendant was only charged with racketeering, in violation of O.C.G.A. § 16-14-4(a), based on the predicate offense of forgery, in violation of O.C.G.A. § 16-9-1, the defendant's requested jury instruction of a lesser-included offense of forgery was properly denied by the trial court; if the jury had not found a "pattern of racketeering activity" under O.C.G.A. § 16-14-3, the jury could not have convicted the defendant of forgery. *Redford v. State*, No. A11A0615, 2011 Ga. App. LEXIS 322 (Apr. 1, 2011).

Legitimate corporation or enterprise. — In an action against the corporate operator of a treatment program for violations of the Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq., the fact that the operator was a legitimate corporation did not insulate the corporation from liability under the act. *Reaugh v. Inner Harbour Hosp.*, 214 Ga. App. 259, 447 S.E.2d 617 (1994).

Mail fraud is a predicate act under Georgia RICO. — See *Georgia ex rel.*

Bowers v. Dairymen, Inc., 813 F. Supp. 1580 (S.D. Ga. 1991).

In a case in which the beneficiaries of two life insurance policies could not directly recover civil damages under 18 U.S.C. §§ 1341, 1342, or 1343, pursuant to O.C.G.A. § 16-14-3(9)(A), the beneficiaries could rely on the insurance company's alleged violation of the federal mail and wire fraud statutes to supply the necessary predicate acts to support a Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq., claim. *Am. Gen. Life & Accident Ins. Co. v. Ward*, 509 F. Supp. 2d 1324 (N.D. Ga. Mar. 12, 2007).

Federal mail and wire fraud are predicate acts of racketeering under the Georgia civil RICO statute, O.C.G.A. § 16-14-1 et seq. *Ayres v. GMC*, 234 F.3d 514 (11th Cir. 2000).

Fraud in stock purchase contract. — In an action for a RICO violation, plaintiffs presented evidence to create a material issue of fact as to whether defendant engaged in predicate acts of criminal fraud, i.e., theft by deception, arising from defendant's purchase of plaintiff's stock in a software development company. *Willis v. First Data Pos, Inc.*, 245 Ga. App. 121, 536 S.E.2d 198 (2000).

Predicate acts under RICO shown. — When the predicate acts necessary to prove a pattern of racketeering activity were proved as a matter of law through the superior court's conclusive, factual determination that the company of which defendant was an officer was operated in such a manner as "to perpetrate fraud and injustice upon Georgia consumers, of which the plaintiff was one," the appellate court presumed the correctness of this finding and the sufficiency of the factual basis therefor. *Speir v. Krieger*, 235 Ga. App. 392, 509 S.E.2d 684 (1998).

Evidence was sufficient to support the conclusion that defendant committed at least two of the predicate acts charged against defendant after it was shown that defendant's possession of items commonly used in connection with drug distribution schemes was similar or related to other predicate acts. *Davitte v. State*, 238 Ga. App. 720, 520 S.E.2d 239 (1999).

To prove a RICO violation, the state had

to show that the defendant committed two or more predicate criminal acts indictable under the RICO statute as part of an enterprise engaging in a pattern of racketeering activity. *Jones v. State*, 252 Ga. App. 332, 556 S.E.2d 238 (2001).

To prove a violation of the Racketeer Influence and Corrupt Organizations Act (RICO), O.C.G.A. § 16-14-1 et seq., the state is required to show that a defendant engaged in at least two predicate criminal acts that would amount to racketeering activity as defined in O.C.G.A. § 16-14-3(9); thus, evidence was sufficient to sustain defendant's conviction under RICO for selling fake badges for a golf tournament to a ticket agency because the evidence revealed at least four predicate acts as defined in O.C.G.A. § 16-14-3(9) — three incidents of theft by deception for defendant receiving money on three different occasions for various sets of fake badges, O.C.G.A. §§ 16-8-3 and 16-14-3(9)(A)(ix), and one incident of first-degree forgery for making the fake badges and delivering them to the ticket agency for payment, O.C.G.A. §§ 16-9-1(a) and 16-14-3(9)(A)(viii). *Davis v. State*, 264 Ga. App. 128, 589 S.E.2d 700 (2003).

In a prosecution under the Georgia Racketeering Influenced and Corrupt Organizations Act, the trial court properly allowed attempt and solicitation of murder to be used as predicate offenses, as they clearly fell within the scope of O.C.G.A. § 16-14-3(9)(A) and (B) and defendant's merger argument was rejected as the two RICO offenses contained different elements and required independent proof of each element. *Dorsey v. State*, 279 Ga. 534, 615 S.E.2d 512 (2005).

Predicate acts under RICO not shown. — Failure of an insurance company to file a policy with the Georgia Insurance Department and the failure of its agent to have a certificate of authority issued by the company before selling the policy to insureds were not predicate acts for purposes of the Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq. *Security Life Ins. Co. v. Clark*, 229 Ga. App. 593, 494 S.E.2d 388 (1997), *aff'd in part and rev'd in part*, 270 Ga. 165, 509 S.E.2d 602 (1998). But see

Clark v. Security Life Ins. Co. of Am., 270 Ga. 165, 509 S.E.2d 602 (1998). See also Security Life Ins. Co. of Am. v. Clark, 273 Ga. 44, 535 S.E.2d 234 (2000); Williams General Corporation v. Stone, 280 Ga. 631, 632 S.E.2d 376 (2006).

When, in neither the complaint nor the evidence in opposition to a motion for summary judgment, did the plaintiffs produce evidence raising the issue that the defendants committed two predicate criminal acts indictable under state or federal law and within one of the categories allowing an action under the Racketeer Influenced Corrupt Organization statute, O.C.G.A. § 16-14-1 et seq., summary judgment for the defendant was proper. Roth v. Connor, 235 Ga. App. 866, 510 S.E.2d 550 (1998).

Plaintiff's Racketeer Influenced and Corrupt Organization allegations against defendants were predicated on misleading press releases, which were public statements by another person not shown to be acting on defendant's behalf, and, even if assumed to be true, would not constitute two separate and distinct, criminal "predicate acts" committed by the defendant. Hedquist v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 236 Ga. App. 181, 511 S.E.2d 558 (1999), rev'd on other grounds, 272 Ga. App. 209, 528 S.E.2d 508 (2000).

In a product liability action against an auto manufacturer claiming Racketeer Influenced and Corrupt Organizations Act (O.C.G.A. § 16-14-1 et seq.) violations, plaintiffs failed to establish violations of O.C.G.A. § 16-10-20 and 18 USC §§ 1341 or 1343 as predicate offenses. Gentry v. Volkswagen of Am., Inc., 238 Ga. App. 785, 521 S.E.2d 13 (1999).

Because there was no evidence that a broker obtained a manufacturer's bond premium by deceitful means with the intention of depriving the manufacturer of those funds, or that the broker knowingly converted the funds to its own use in violation of the oral agreement, the evidence showed that once the broker received the premium, it instructed an insurance company to proceed with posting the bonds, and it was only after being contacted by the manufacturer that the broker was put on notice that there was a problem with the posting of the bonds, the

manufacturer's claims of theft were not supported by the record, and the manufacturer failed to show two predicate acts to support a pattern of racketeering activity; therefore, the trial court did not err in granting summary judgment to the broker on the manufacturer's claim under Georgia's Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq. Aon Risk Servs. v. Commercial & Military Sys. Co., 270 Ga. App. 510, 607 S.E.2d 157 (2004).

Poultry growers failed to prove a claim against poultry processing companies under the Georgia Racketeer Influenced and Corrupt Organizations statute, O.C.G.A. § 16-14-3, because the growers failed to prove the two alleged predicate acts of mail fraud and theft by deception. Adkins v. Cagle Foods JV, L.L.C., 411 F.3d 1320 (11th Cir. 2005).

Financial planner failed to demonstrate that the insurance company committed any predicate acts to support a claim under the Georgia Racketeer Influenced and Corrupt Organizations (RICO) Act, specifically O.C.G.A. § 16-14-3, and the planner's RICO claim against the insurance company was necessarily dismissed because the planner did not claim that the insurance company even knew about the "no detriment to the planner" provision in the settlement agreement, and thus, the insurance company could not have intended to aid the parent company and the subsidiary in stealing the planner's chose of action, the planner had not alleged facts sufficient to state a plausible claim for theft on the claim's face, and an accessory after the fact could not be an accomplice to the crime. Rosen v. Protective Life Ins. Co., No. 1:09-cv-03620-WSD, 2010 U.S. Dist. LEXIS 50392 (N.D. Ga. May 20, 2010).

Sufficiency of complaint. — When a complaint alleged that the defendants conducted an enterprise through a pattern of racketeering activity, the requisite predicate acts for showing a "pattern of racketeering activity" were set forth in detail in the complaint, and the complaint further alleged that these offenses were not committed as an occasional practice but were part of a systematic and ongoing pattern over a number of years concealed

by a scheme of subterfuge and intimidation, the trial court properly denied the defendant's motion for judgment on the pleadings or for summary judgment. *Larson v. Smith*, 194 Ga. App. 698, 391 S.E.2d 686 (1990).

Sale of timber from a single parcel of real property, by means of a single deed, in one isolated transaction, could not be broken down into two predicate acts by separately charging the sale and the filing of the deed. *Raines v. State*, 219 Ga. App. 893, 467 S.E.2d 217 (1996).

Conviction of only some defendants. — Trial court did not err in refusing to direct a verdict in favor of the defendants as to a RICO count after the court directed a verdict for one of defendants' codefendants who was alleged in the indictment to comprise "the enterprise", as the dismissal of the codefendant did not result in a fatal variance between the allegation and the proof. *Sparkman v. State*, 209 Ga. App. 763, 434 S.E.2d 564 (1993).

Reelection campaigns. — By its express terms, the Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq., includes as a crime a reelection campaign by the holder of public office in which two or more similar or interrelated predicate offenses specified in the Act are committed. *Caldwell v. State*, 253 Ga. 400, 321 S.E.2d 704 (1984).

Repeated sale of non-existent insurance. — While the illegal sale of insurance is not in and of itself a basis for a racketeer influenced and corrupt organization (RICO) action absent further evidence of fraud rising to the level of theft by deception, the repeated sale to unsuspecting consumers of non-existent insurance was the very essence of such fraud and was exactly the type of criminally fraudulent activity masquerading as "business" that RICO was designed to address. *Speir v. Krieger*, 235 Ga. App. 392, 509 S.E.2d 684 (1998).

Internet fraud. — In a RICO action based on federal and state laws, a civil judgment of over \$ 16 million dollars was entered in favor of an Internet service provider against an individual who stole Internet accounts and used them in conducting the individual's spamming and

spoofing activities over a two-year period. *Earthlink, Inc. v. Carmack*, 2003 U.S. Dist. LEXIS 9963 (N.D. Ga. May 7, 2003).

Racketeering activity supportive of conviction for participation in criminal street gang activity. — Defendant juvenile was properly found to have committed the crime of participation in criminal street gang activity under O.C.G.A. § 16-15-4(a) because the evidence supported a finding that the defendant was part of a criminal street gang under O.C.G.A. § 16-15-3(2) based on the colors the defendant wore and the statement as to the removal of a gang tattoo and because the defendant committed the enumerated offenses of carrying a concealed weapon and theft by shoplifting as referenced by O.C.G.A. §§ 16-14-3-(9)(A)(ix) and 16-15-3(1)(A), (J) and apparently stole a flare gun with the intent to further gang activity. In the Interest of C.P., 296 Ga. App. 572, 675 S.E.2d 287 (2009).

Cited in *Western Bus. Sys. v. Slaton*, 492 F. Supp. 513 (N.D. Ga. 1980); *Evans v. State*, 252 Ga. 312, 314 S.E.2d 421 (1984); *Mills v. Fitzgerald*, 668 F. Supp. 1554 (N.D. Ga. 1987); *Bohannon v. Allstate Ins. Co.*, 118 F.R.D. 151 (S.D. Ga. 1986); *Cobb v. Kennon Realty Servs., Inc.*, 191 Ga. App. 740, 382 S.E.2d 697 (1989); *Emrich v. Winsor*, 198 Ga. App. 333, 401 S.E.2d 76 (1991); *Bethune v. State*, 198 Ga. App. 490, 402 S.E.2d 276; *Drewry v. State*, 201 Ga. App. 674, 411 S.E.2d 898 (1991); *Johnson v. Fleet Fin., Inc.*, 785 F. Supp. 1003 (S.D. Ga. 1992); *Cobb County v. Jones Group*, 218 Ga. App. 149, 460 S.E.2d 516 (1995); *Olukoya v. American Ass'n of Cab Cos.*, 219 Ga. App. 508, 465 S.E.2d 715 (1995); *Brown v. Freedman*, 222 Ga. App. 213, 474 S.E.2d 73 (1996); *Brannon v. State*, 243 Ga. App. 28, 530 S.E.2d 761 (2000); *Markowitz v. Wieland*, 243 Ga. App. 151, 532 S.E.2d 705 (2000); *Tom's Amusement Co. v. Total Vending Servs.*, 243 Ga. App. 294, 533 S.E.2d 413 (2000); *Nicholson v. Windham*, 257 Ga. App. 429, 571 S.E.2d 466 (2002); *Club Car, Inc. v. Club Car (Quebec) Import, Inc.*, 276 F. Supp. 2d 1276 (S.D. Ga. 2003); *Schoenbaum Ltd. Co., LLC v. Lenox Pines, LLC*, 262 Ga. App. 457, 585 S.E.2d 643 (2003); *Saxon v. State*, 266 Ga. App. 547, 597 S.E.2d 608 (2004); *Club Car, Inc. v.*

Club Car (Quebec) Imp., Inc., 362 F.3d 775 (11th Cir.); Faillace v. Columbus Bank & Trust Co., 269 Ga. App. 866, 605 S.E.2d 450 (2004); J. Kinson Cook of Ga., Inc. v. Heery/Mitchell, 284 Ga. App. 552, 644 S.E.2d 440 (2007); Smith v. Chemtura Corp., 297 Ga. App. 287, 676 S.E.2d 756

(2009); Williams v. Mohawk Indus., 568 F.3d 1350 (11th Cir. 2009); Cisco v. State, 285 Ga. 656, 680 S.E.2d 831 (2009); Summit Auto. Group, LLC v. Clark Kia Motors Ame., Inc., 298 Ga. App. 875, 681 S.E.2d 681 (2009).

OPINIONS OF THE ATTORNEY GENERAL

“Alien corporations.” — Territorial and District of Columbia corporations are organized under the laws of the United States and do not fall within the meaning

of “alien corporation” as defined in O.C.G.A. § 16-14-3(1). 1982 Op. Att’y Gen. No. 82-89.

16-14-4. Prohibited activities.

(a) It is unlawful for any person, through a pattern of racketeering activity or proceeds derived therefrom, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property, or personal property of any nature, including money.

(b) It is unlawful for any person employed by or associated with any enterprise to conduct or participate in, directly or indirectly, such enterprise through a pattern of racketeering activity.

(c) It is unlawful for any person to conspire or endeavor to violate any of the provisions of subsection (a) or (b) of this Code section. (Code 1933, § 26-3403, enacted by Ga. L. 1980, p. 405, § 1; Ga. L. 1982, p. 1385, §§ 3, 9; Ga. L. 1984, p. 22, § 16.)

Law reviews. — For article, “A Comprehensive Analysis of Georgia RICO,” see 9 Georgia St. U.L. Rev. 537 (1993).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION APPLICATION

1. IN GENERAL
2. COMPANIES AND EMPLOYEES
3. LENDING INSTITUTIONS
4. INSURANCE

General Consideration

Former Code 1933, § 26-3403 prohibited acquisition even of legitimate businesses with proceeds of racketeering. Western Bus. Sys. v. Slaton, 492

F. Supp. 513 (N.D. Ga. 1980) (see O.C.G.A. § 16-14-4).

Subsection (b) not unconstitutional. — O.C.G.A. § 16-14-4(b) puts a person of ordinary intelligence on notice that he or she is committing a crime and is

therefore not unconstitutionally vague or overbroad. *Chancey v. State*, 256 Ga. 415, 349 S.E.2d 717 (1986), cert. denied, 481 U.S. 1029, 107 S. Ct. 1954, 95 L. Ed. 2d 527 (1987).

When both alleged conspiracy and actual violation of O.C.G.A. § 16-14-4(b) charged same acts, committed at the same time, by the same persons, as part of the same transactions, the court subjected defendant to one conviction and one punishment. *Washington v. State*, 183 Ga. App. 422, 359 S.E.2d 198 (1987).

Use of predicate offenses as basis for conviction on separate offenses. — Convictions on 75 counts of stealing public records could not stand, where state, by choosing gratuitously to include as predicates for a Racketeer Influenced and Corrupt Organization (RICO) violation all of the instances of the prohibited acts recited in the counts, “used up” the evidence, so that there was none left to form the basis for the separate offenses enumerated in the counts. *Martin v. State*, 189 Ga. App. 483, 376 S.E.2d 888 (1988), cert. denied, 189 Ga. App. 911, 376 S.E.2d 888 (1989).

“Enterprise” and “pattern of racketeering” may be proved by same evidence. — State may use the same evidence to prove both the separate elements of an enterprise and a pattern of racketeering. While proof of one of the elements does not necessarily establish the other, the proof used to establish these separate elements may in particular cases coalesce. *Martin v. State*, 189 Ga. App. 483, 376 S.E.2d 888 (1988), cert. denied, 189 Ga. App. 911, 376 S.E.2d 888 (1989).

Legislative intent as to scope. — Legislature intended to subject to the coverage of the Racketeer Influenced Corrupt Organizations (RICO) statute two crimes, included in the statute as designated predicate acts, which are part of the same scheme, without the added burden of showing that the defendant would continue the conduct or had been guilty of like conduct before the incidents charged as a RICO violation. *Dover v. State*, 192 Ga. App. 429, 385 S.E.2d 417 (1989).

Evidence not rendered inadmissible by lack of commonality for class

action. — Fact that separate claims against defendants were determined not to have sufficient commonality so as to be appropriate for class action did not render the evidence of these other transactions irrelevant or inadmissible in establishing elements of a single plaintiff’s claims of fraud, unfair business practices, and Racketeer Influenced and Corrupt Organizations Act (RICO), O.C.G.A. § 16-14-1 et seq., violations. *Brown Realty Assocs. v. Thomas*, 193 Ga. App. 847, 389 S.E.2d 505 (1989).

Predicate acts. — Racketeer Influenced Corrupt Organizations (RICO) claim alleging only mail and wire fraud as a predicate act may be dismissed for failure to adequately allege a pattern of racketeering activity because such predicate acts are not enumerated in former § 16-14-3(3)(A) or (B) (now § 16-14-3(9)(A) and (B)). *J.G. Williams, Inc. v. Regency Properties, Ltd.*, 672 F. Supp. 1436 (N.D. Ga. 1987) (decided prior to 1989 amendment which rearranged paragraph in alphabetical order).

When a complaint alleged that the defendant conducted an enterprise through a pattern of racketeering activity, the requisite predicate acts for showing a “pattern of racketeering activity” were set forth in detail in the complaint, and the complaint further alleged that these offenses were not committed as an occasional practice but were part of a systematic and ongoing pattern over a number of years concealed by a scheme of subterfuge and intimidation, the trial court properly denied the defendant’s motion for judgment on the pleadings or for summary judgment. *Larson v. Smith*, 194 Ga. App. 698, 391 S.E.2d 686 (1990).

In an action against the corporate operator of a treatment program for violations of the Georgia Racketeer Influenced and Corrupt Organizations Act (RICO), O.C.G.A. § 16-14-1 et seq., evidence that by committing mail fraud, the defendant was the perpetrator and direct beneficiary of a pattern of racketeering activity and not merely a victim or passive instrumentality, would subject defendant to RICO liability. *Reaugh v. Inner Harbour Hosp.*, 214 Ga. App. 259, 447 S.E.2d 617 (1994).

In an action against the corporate oper-

General Consideration (Cont'd)

ator of a treatment program for violations of the Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq., evidence that the operator through a pattern of racketeering activity, i.e., mail fraud, acquired an interest in or control of money was sufficient to find liability. *Reaugh v. Inner Harbour Hosp.*, 214 Ga. App. 259, 447 S.E.2d 617 (1994).

Aggravated battery as a predicate act was not established where the acts alleged were not indictable under the criminal statute. *Mullen v. Nezhat*, 223 Ga. App. 278, 477 S.E.2d 417 (1996).

Failure of an insurance company to file a policy with the Georgia Insurance Department and the failure of its agent to have a certificate of authority issued by the company before selling the policy to insureds were not predicate acts for purposes of the Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq. *Security Life Ins. Co. v. Clark*, 229 Ga. App. 593, 494 S.E.2d 388 (1997), aff'd in part and rev'd in part, 270 Ga. 165, 509 S.E.2d 602 (1998). But see *Clark v. Security Life Ins. Co. of Am.*, 270 Ga. 165, 509 S.E.2d 602 (1998). See also *Security Life Ins. Co. of Am. v. Clark*, 273 Ga. 44, 535 S.E.2d 234 (2000); *Williams General Corporation v. Stone*, 280 Ga. 631, 632 S.E.2d 376 (2006).

Trial court erred in failing to grant defendant's demurrer to ten predicate acts of racketeering activity involving the filing of false deeds because the deed transactions were part of 14 theft by taking transactions and therefore could not form the basis of separate predicate acts. *Adams v. State*, 231 Ga. App. 279, 499 S.E.2d 105 (1998).

House purchasers failed to establish a pattern of racketeering activity by a lender that held a mortgage on property at the time of its sale to the purchasers, even though the lender had the first mortgage on over 100 properties owned by the seller. *Ali v. Fleet Fin., Inc.*, 232 Ga. App. 13, 500 S.E.2d 914 (1998).

Claim of theft by deception as a predicate act failed where provisions of a contract affirmed by plaintiffs foreclosed such

claim and an unrealized diminution in the value of property purchased by plaintiffs did not equate to the defendant obtaining the property as plaintiffs were still the owners. *Markowitz v. Wieland*, 243 Ga. App. 151, 532 S.E.2d 705 (2000).

When an alleged predicate act is mail fraud, the plaintiff must have been the target of the scheme to defraud and must have relied to plaintiff's detriment on misrepresentations made in furtherance of that scheme. *Markowitz v. Wieland*, 243 Ga. App. 151, 532 S.E.2d 705 (2000).

Crime of influencing witnesses as a predicate act was not established by a claim that the witness was threatened with a lawsuit and changed the witness's testimony as a result because the threat of a lawsuit does not amount to conduct prohibited by O.C.G.A. § 16-10-93. *Markowitz v. Wieland*, 243 Ga. App. 151, 532 S.E.2d 705 (2000).

District court properly granted summary judgment under Fed. R. Civ. P. 56 in favor of a Georgia golf cart manufacturer on a Canadian golf cart distributor's claim under the Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-4(a), where the distributor did not offer any proof of specific intent to defraud with respect to mail fraud, 18 U.S.C. § 1341, in the manufacturer's collection and payment of the debt. *Quebec Provincial Sales Tax. Club Car, Inc. v. Club Car (Quebec) Imp., Inc.*, 362 F.3d 775 (11th Cir.), cert. denied, 543 U.S. 1002, 125 S. Ct. 618, 160 L. Ed. 2d 461 (2004).

In a prosecution of defendant, a sheriff, for murder and violations of Georgia Racketeer Influenced and Corrupt Organizations Act (RICO), O.C.G.A. § 16-14-1 et seq., even if the trial court erred in not quashing theft allegations as predicate RICO acts, the other predicate offenses, including bribery, solicitation of murder, murder, and witness tampering supported the RICO convictions. *Dorsey v. State*, 279 Ga. 534, 615 S.E.2d 512 (2005).

Class action suit by legal workers of a Georgia rug manufacturer adequately stated a state law RICO claim under O.C.G.A. § 16-14-4(a) because, under 18 U.S.C. § 1961(1)(F), the term "racketeering activity" included the manufacturer's widespread pattern of fraud under 18

U.S.C. § 1546, i.e., the misuse of visas, permits, and other documents to hire illegal aliens in order to depress the hourly wages of the manufacturer's workers. *Williams v. Mohawk Indus.*, 465 F.3d 1277 (11th Cir. 2006), cert. denied, mot. denied, 2007 U.S. LEXIS 2798 (U.S. 2007).

Transaction occurring after action filed. — In a Racketeer Influenced and Corrupt Organizations action, the mere fact that at least one of the transactions occurred subsequent to the filing of plaintiff's suit, evidence of it was not barred merely because it was later in time, where the incident on trial would constitute one of the acts upon which the cause of action is predicated. *Interagency, Inc. v. Danco Fin. Corp.*, 203 Ga. App. 418, 417 S.E.2d 46 (1992).

Violation of O.C.G.A. § 16-10-20, prohibiting the making of false statements, constitutes "racketeering activity" for purposes of a Racketeer Influenced and Corrupt Organizations (RICO), O.C.G.A. § 16-14-1 et seq., claim. *Maddox v. Southern Eng'g Co.*, 216 Ga. App. 6, 453 S.E.2d 70 (1994).

Nexus with organized crime is not necessary to prevail on a Racketeer Influenced and Corrupt Organizations Act (RICO), O.C.G.A. § 16-14-1 et seq., claim. *Dee v. Sweet*, 218 Ga. App. 18, 460 S.E.2d 110 (1995).

Proof of "enterprise" not required. — Violation of O.C.G.A. § 16-14-4(a) does not require proof of an "enterprise," but only that the accused acquired any real or personal property, including money, through a pattern of racketeering activity. *Cobb County v. Jones Group*, 218 Ga. App. 149, 460 S.E.2d 516 (1995).

Commonality satisfied. — In RICO cases, an alleged scheme to defraud which affects a class of people is a common question of law and/or fact, regardless of the characteristics of the scheme's intended victims. *Buford v. H & R Block, Inc.*, 168 F.R.D. 340 (S.D.Ga. 1996), aff'd sub nom. *Jones v. H & R Block Tax Servs.*, 117 F.3d 1433 (11th Cir. 1997).

Because plaintiff employees alleged defendant employer engaged in fraud and misuse of visas under 18 U.S.C. § 1546, as a predicate offense under O.C.G.A. § 16-14-3(9), commonality under Fed. R.

Civ. P. 23(a)(2) was satisfied as to the state racketeering claims under O.C.G.A. § 16-14-4 and under 18 U.S.C. § 1692 of the federal Racketeer Influence and Corrupt Organizations Act. *Williams v. Mohawk Indus.*, 568 F.3d 1350 (11th Cir. 2009).

Conspiracy is not an essential element of a RICO claim brought under O.C.G.A. § 16-14-4(a) or (b) and may not be an essential element of subsection (c), depending upon the allegations. *Patterson v. Proctor*, 237 Ga. App. 244, 514 S.E.2d 37 (1999).

Telecommunication providers. — In an action in which an interexchange carrier asserted it was not obligated to pay fees to a local carrier for misrepresented toll-free cell calls, its amendment to add claims alleging violations under the Georgia RICO Act, O.C.G.A. § 16-14-1 et seq., common law fraud, and the Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., was not futile given the court's denial of summary judgment on the local carrier's counterclaims; amendment under Fed. R. Civ. P. 15 was granted. *ITC Deltacom Communs. v. US LEC Corp.*, No. 3:02-CV-116-JTC, 2004 U.S. Dist. LEXIS 27557 (N.D. Ga. Mar. 15, 2004).

Lesser included offense charge not warranted. — As a defendant was only charged with racketeering, in violation of O.C.G.A. § 16-14-4(a), based on the predicate offense of forgery, in violation of O.C.G.A. § 16-9-1, the defendant's requested jury instruction of a lesser-included offense of forgery was properly denied by the trial court; if the jury had not found a "pattern of racketeering activity" under O.C.G.A. § 16-14-3(8)(a), the jury could not have convicted the defendant of forgery. *Redford v. State*, No. A11A0615, 2011 Ga. App. LEXIS 322 (Apr. 1, 2011).

Statute of limitations five years. — Trial court did not err by dismissing an indictment charging the defendants with racketeering violations and conspiracy as the state failed to prove that an overt act in furtherance of the conspiracy occurred less than five years from the date of the indictment. *State v. Conzo*, 293 Ga. App. 72, 666 S.E.2d 404 (2008).

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Cited in *Morast v. Lance*, 631 F. Supp. 474 (N.D. Ga. 1986); *Brown v. State*, 191 Ga. App. 76, 381 S.E.2d 101 (1989); *Pepsico Truck Rental, Inc. v. Eastern Foods, Inc.*, 145 Ga. App. 410, 243 S.E.2d 662 (1978); *Cobb v. Kennon Realty Servs., Inc.*, 191 Ga. App. 740, 382 S.E.2d 697 (1989); *Brown v. Freedman*, 222 Ga. App. 213, 474 S.E.2d 73 (1996); *Rohm & Haas Co. v. Gainesville Paint & Supply Co.*, 225 Ga. App. 441, 483 S.E.2d 888 (1997); *Tom's Amusement Co. v. Total Vending Servs.*, 243 Ga. App. 294, 533 S.E.2d 413 (2000); *JLM Enters., Inc. v. Houston Gen. Ins. Co.*, 196 F. Supp. 2d 1299 (S.D. Ga. 2002); *Liberty Lending Servs. v. Canada*, 293 Ga. App. 731, 668 S.E.2d 3 (2008); *Cisco v. State*, 285 Ga. 656, 680 S.E.2d 831 (2009).

Application**1. In General**

Telemarketing practices. — Court properly denied the defendants' motion for summary judgment in a bank's state RICO action because a genuine issue of fact remained as to the defendants' participation in a pattern of racketeering activity sufficient to ground liability under O.C.G.A. § 16-14-4(a); the jury could reasonably find that the defendants' scheme was to obtain fraudulent charges from customers, to defraud the bank into approving the charges in the first instance, to forestall the collapse of the scheme by never contesting chargebacks and by concealing their volume for as long as possible, and to use the time thus gained to transform their telemarketing entity's grosses into personal assets. *Faillace v. Columbus Bank & Trust Co.*, 269 Ga. App. 866, 605 S.E.2d 450 (2004).

Failure to strike offenses held harmless error. — Failure to strike from a Racketeer Influenced and Corrupt Organizations Act (RICO), O.C.G.A. § 16-14-1 et seq., indictment, as predicate offenses, three thefts which had been formerly prosecuted was harmless error, where there was no reason to infer that defendant's guilty pleas to other offenses were tainted or otherwise affected by the superfluous addition of predicate offenses which

had formerly been prosecuted. *Bethune v. State*, 198 Ga. App. 490, 402 S.E.2d 276, cert. denied, 198 Ga. App. 897, 402 S.E.2d 276 (1991).

"Salting" coin boxes. — When laundromat purchasers alleged the vendor added money to washer and dryer coin boxes in order to persuade the purchasers to purchase the business, the alleged addition or "salting" of coins did not constitute a "pattern of racketeering activity" within the meaning of O.C.G.A. § 16-14-4. *Waldschmidt v. Crosa*, 177 Ga. App. 707, 340 S.E.2d 664 (1986).

Falsely accusing customers of shoplifting, even if it constituted a pattern of criminal activity, was not conduct intended to derive pecuniary gain as required by O.C.G.A. § 16-14-4. *Sevcech v. Ingles Mkts., Inc.*, 222 Ga. App. 221, 474 S.E.2d 4 (1996).

Defendant's indictment and sentence in a prior case were admissible, where such evidence, when combined with other evidence introduced at trial, showed the requisite pattern of racketeering activity. *Brown v. State*, 191 Ga. App. 76, 381 S.E.2d 101, cert. denied, 191 Ga. App. 921, 381 S.E.2d 101 (1989).

Indictment sufficiently specific. — Indictment for criminal racketeering alleged the offense with sufficient specificity when the indictment set forth specific timber transactions involving specific persons, places, acreages, deals, and owners. *Grant v. State*, 227 Ga. App. 88, 488 S.E.2d 79 (1997); *Adams v. State*, 231 Ga. App. 279, 499 S.E.2d 105 (1998).

Indictment charging a conspiracy to violate Georgia's Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq., was sufficient because there was no requirement that the state prove that a defendant personally committed the underlying predicate offenses personally. *Pasha v. State*, 273 Ga. App. 788, 616 S.E.2d 135 (2005).

Evidence sufficient for conviction. — See *Brown v. State*, 191 Ga. App. 76, 381 S.E.2d 101, cert. denied, 191 Ga. App. 921, 381 S.E.2d 101 (1989); *Thompson v. State*, 211 Ga. App. 887, 440 S.E.2d 670 (1994).

Evidence showing that cocaine chronically used by defendant was taken from

shipments of cocaine imported by defendant and others into the state was sufficient to sustain defendant's conviction, where such evidence established a connection between the cocaine possession offense and the alleged "enterprise." *Chancey v. State*, 256 Ga. 415, 349 S.E.2d 717 (1986), cert. denied, 481 U.S. 1029, 107 S. Ct. 1954, 95 L. Ed. 2d 527 (1987).

Trial court's failure to suppress jewelry in prosecution under O.C.G.A. § 16-14-4 was harmless error, as there was sufficient evidence to convict the defendant absent the jewelry; the state introduced voluminous documentary evidence, supported by testimony from coworkers and bank employees, concerning the forgery scheme. *Henry v. State*, 277 Ga. App. 302, 626 S.E.2d 511 (2006).

Defendants' RICO convictions under O.C.G.A. § 16-14-4 were upheld on appeal, as: (1) both the defendants were placed on sufficient notice regarding the conspiracy nature of the charges; (2) jury instructions and the trial court's recharge on the issues of conspiracy and knowledge were properly given; and (3) neither defendant preserved error as to an alleged violation of O.C.G.A. § 17-8-57 by either raising a contemporaneous objection or moving for a mistrial based on the trial court's alleged improper comments. *Graham v. State*, 282 Ga. App. 576, 639 S.E.2d 384 (2006).

There was sufficient evidence to support a defendant's conviction under the Georgia Racketeering Influenced and Corrupt Organization Act, O.C.G.A. § 16-4-1 et seq., as contrary to the defendant's contention that the crimes were isolated incidents, the acts involving the abduction and murder of a store manager and various thefts and interrelated crimes set forth at least two incidents of racketeering activity that have the same or similar intents, results, accomplices, victims, or methods of commission or otherwise were interrelated by distinguishing characteristics and were not isolated incidents. The state established a number of interrelated incidents of racketeering activity that had the same intents and results (monetary gain) and the same accomplices (the defendant and other members of the group) and the evidence also established that

those were not isolated incidents, but a continuing pattern of criminal activity. *Overton v. State*, 295 Ga. App. 223, 671 S.E.2d 507 (2008), cert. denied, No. S09C0654, 2009 Ga. LEXIS 212 (Ga. 2009).

Evidence insufficient for conviction. — Single RICO count conviction required reversal since though evidence was presented that the defendant, a county school superintendent, knew or should have known that the source of funds was improper or illegal, no evidence was presented that before the superintendent's assistants confessed to theft of funds, the defendant had knowledge that the source of the funds was theft as opposed to some other source such as illegal kickbacks or contributions from third parties. *Purvis v. State*, 208 Ga. App. 653, 433 S.E.2d 58 (1993).

Evidence of pattern of racketeering activity sufficient to withstand summary judgment. — In an action alleging that the defendants cut and removed timber from the plaintiffs' property without their consent, the defendants were not entitled to summary judgment on the basis that the plaintiffs failed to show that the defendants engaged in a pattern of racketeering activity where the plaintiffs alleged that the defendants cut and removed timber from two other properties without the owners' consent. *Patterson v. Proctor*, 237 Ga. App. 244, 514 S.E.2d 37 (1999).

Evidence insufficient to establish pattern of proscribed activity. — Evidence showing merely two joint victims of one isolated transaction was not sufficient to establish a pattern of proscribed activity. *Emrich v. Winsor*, 198 Ga. App. 333, 401 S.E.2d 76 (1991).

Because there was no evidence that a broker obtained a manufacturer's bond premium by deceitful means with the intention of depriving the manufacturer of those funds, or that the broker knowingly converted the funds to its own use in violation of the oral agreement, the evidence showed that once the broker received the premium, it instructed an insurance company to proceed with posting the bonds, and it was only after being contacted by the manufacturer that the

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broker was put on notice that there was a problem with the posting of the bonds, the manufacturer's claims of theft were not supported by the record, and the manufacturer failed to show two predicate acts to support a pattern of racketeering activity; therefore, the trial court did not err in granting summary judgment to the broker on the manufacturer's claim under Georgia's Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq. *Aon Risk Servs. v. Commercial & Military Sys. Co.*, 270 Ga. App. 510, 607 S.E.2d 157 (2004).

In a case in which a property owner did not focus on the substantive claim under the Racketeering Influence and Corrupt Organization Act (RICO) and O.C.G.A. § 16-14-4 as decided by the district court, but rather challenged an earlier district court order indicating that the property owner did not have standing to allege RICO violations with respect to any conduct during the original state civil action, as the property owner was not a party to that action, the district court's entry of summary judgment against the property owner on the RICO claims was affirmed. The property owner's argument did not go beyond mere accusations unsupported by evidence, and the property owner pointed to no evidence that an enterprise existed for the purposes of RICO. *Sun v. Girardot*, No. 06-15181, 2007 U.S. App. LEXIS 10630 (11th Cir. May 4, 2007) (Unpublished).

Connection between injury and predicate acts required in civil action. — When the evidence did not show that the defendant's misrepresentations in violation of O.C.G.A. § 16-10-20, prohibiting the making of false statements, were the proximate cause of the plaintiff's injuries, the plaintiff lacked standing to assert claims under the Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq. *Maddox v. Southern Eng'g Co.*, 231 Ga. App. 802, 500 S.E.2d 591 (1998).

Survival of tort action following death. — In a case in which the intended

beneficiaries of two life insurance policies alleged violations of Georgia's Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-4-1 et seq., the representative of the decedent's estate may be able to recover in a representative capacity for acts directed toward, or harm incurred by, the decedent. Under O.C.G.A. § 9-2-41, a tort action did not abate by the death of the injured party, but survived to the personal representative of the decedent. *Am. Gen. Life & Accident Ins. Co. v. Ward*, 509 F. Supp. 2d 1324 (N.D. Ga. Mar. 12, 2007).

Scheme to defraud entrepreneurs. — On claims by plaintiff buyers of distributorships against defendants, the seller and the seller's principal and relatives and other corporate entities, the Racketeering Influenced and Corrupt Organizations Act's reliance element did not destroy predominance for Fed. R. Civ. P. 23(b)(3), and, the allegations were that defendants undertook a single scheme to defraud would-be entrepreneurs. *Brenner v. Future Graphics, LLC*, 258 F.R.D. 561 (N.D. Ga. 2007).

Chicken growers. — Chicken grower's O.C.G.A. § 16-14-4 claim failed because the grower produced no evidence specific to that claim, and the grower failed to create a genuine issue of material fact for the same reasons the grower failed to create an issue in the grower's fraud claims (the grower could not produce evidence that the chicken processing company underpaid the grower for the grower's flocks). *Mims v. Cagle Foods JV, LLC*, 2005 U.S. App. LEXIS 11579 (11th Cir. June 15, 2005) (Unpublished).

Fraudulent borrowing scheme from parishioners. — Indictment, which described a scheme of fraudulent borrowing from the parishioners of one defendant, a pastor, to benefit the pastor and the other defendant, a banker, sufficiently described the RICO crimes and predicate acts under O.C.G.A. § 16-14-4(a) and (c) so as to inform the defendants of the charges against the defendants and protect the defendants against another prosecution for the same offense. *State v. Pittman*, 302 Ga. App. 531, 690 S.E.2d 661 (2010).

2. Companies and Employees

Offenses committed by agents or employees of corporation. — In an action against the corporate operator of a treatment program for violations of the Georgia Racketeer Influenced and Corrupt Organizations Act (RICO), O.C.G.A. § 16-14-1 et seq., since there was evidence that agents or employees of the operator committed predicate offenses alleged in the pleadings, and there were material issues of fact as to whether the operator was a party to or involved in commission of the offenses, the RICO enterprise could consist of the corporation and its agents or employees with respect to such offenses. *Reaugh v. Inner Harbour Hosp.*, 214 Ga. App. 259, 447 S.E.2d 617 (1994).

Corporation could be held liable in a civil action for RICO predicate acts performed by the corporation's employees within the scope of their employment. *Cobb County v. Jones Group*, 218 Ga. App. 149, 460 S.E.2d 516 (1995).

Corporation's liability for activities prior to incorporation. — Corporation could be held responsible for racketeering activity completed prior to incorporation when the activity provided benefits to the corporation. *Cobb County v. Jones Group*, 218 Ga. App. 149, 460 S.E.2d 516 (1995).

Claims against employer in connection with hiring illegal aliens. — On remand from the U.S. Supreme Court, a class action suit filed by legal employees of a Georgia rug manufacturer, alleging state RICO violations based on the widespread hiring of illegal aliens in order to depress the hourly wages of the manufacturer's workers, survived a motion to dismiss for failure to state a claim; the federal appellate court deferred to the Supreme Court of Georgia's holding that O.C.G.A. § 16-14-4, when read in conjunction with O.C.G.A. §§ 1-3-3(14) and 16-1-3(12) provided that "any person" could be sued under the Georgia RICO statute, including corporations such as the rug manufacturer. *Williams v. Mohawk Indus.*, 465 F.3d 1277 (11th Cir. 2006), cert. denied, mot. denied, 2007 U.S. LEXIS 2798 (U.S. 2007).

Law firms. — Racketeering claim against a law firm failed when there was no evidence to support proximate causa-

tion. *Smith v. Morris, Manning & Martin, LLP*, 293 Ga. App. 153, 666 S.E.2d 683 (2008).

Civil complaint against company failed to state RICO violation. — Plaintiffs, residents, sued the defendants, a chemical plant and a laboratory, alleging the plaintiffs were injured due to chemical fires at the laboratory's facility. As the complaint failed to allege a pattern of two or more of the 37 predicate acts listed in Georgia's Racketeer Influenced and Corrupt Organization (RICO) statute, O.C.G.A. § 16-4-1 et seq., the defendants were properly granted summary judgment on the RICO claim. *Smith v. Chemtura Corp.*, 297 Ga. App. 287, 676 S.E.2d 756 (2009).

Action against transferee of franchisee failed. — Trial court erred by failing to grant a succeeding franchisee's motion for summary judgment in a fraud suit brought by car dealership consumers as the consumers failed to establish the succeeding franchisee's participation or involvement in any of the complained of transactions; thus, no unfair business violations were established, and no direct claim against a transferee was permitted under the Bulk Transfer Act, O.C.G.A. § 11-6-101 et seq. Additionally, the consumers' claims under Georgia's Racketeer Influenced and Corrupt Organizations statute, O.C.G.A. § 16-14-1 et seq., likewise failed since the uncontroverted evidence established without question that the succeeding franchisee did not make any misrepresentations to the consumers nor participated in any of the transactions that formed the basis of the consumers' claims. *Summit Auto. Group, LLC v. Clark Kia Motors Ame., Inc.*, 298 Ga. App. 875, 681 S.E.2d 681 (2009).

Cause of action stated. — Corporate officer stated a cause of action for a violation of O.C.G.A. § 16-14-4 in an action arising from the officer's discharge when the officer alleged (1) the obstruction of justice by the defendants, (2) a pattern consisting of the officer being placed on administrative leave, the termination of the officer's employment, and the similar and interrelated termination of another person, and (3) that the defendants acted to deter the plaintiff and the other person

Application (Cont'd)**2. Companies and Employees** (Cont'd)

from freely giving truthful testimony before a court or to injure them because they did so testify. *O'Neal v. Garrison*, 263 F.3d 1317 (11th Cir. 2001).

Class action complaint by carpet manufacturing workers adequately pleaded civil federal and Georgia RICO violations based on employer's widespread practice of hiring, harboring, encouraging, and inducing illegal aliens in violation of 8 U.S.C. § 1324 of the Immigration and Nationality Act, causing reductions in the manufacturer's legal workers' hourly wages; by paying recruiters to find illegal workers and bring the illegal workers to Georgia, the employer engaged in a prohibited "enterprise" under 18 U.S.C. § 1962(c). *Williams v. Mohawk Indus.*, 465 F.3d 1277 (11th Cir. 2006), cert. denied, mot. denied, 2007 U.S. LEXIS 2798 (U.S. 2007).

3. Lending Institutions

Loan practices. — Because loan practices of charging discount points and other interest charges during the first month of a loan were legal, the plaintiffs' Georgia Racketeer Influenced and Corrupt Organizations (RICO), O.C.G.A. § 16-14-4, claims failed. *Johnson v. Fleet Fin., Inc.*, 785 F. Supp. 1003 (S.D. Ga. 1992), aff'd, 4 F.3d 946 (11th Cir. 1993).

Usurious interest rate. — Trial court properly granted summary judgment to the defendant regarding the plaintiff's claim that the defendant violated the RICO Act by knowingly employing a scheme to charge usurious interest since the evidence showed that the inappropriate interest charges made by the defendant were the result of a programming error in software and that such programming error was not requested by the defendant, and the defendant had no prior knowledge of the problem. *Jordan v. Tri County Ag, Inc.*, 248 Ga. App. 661, 546 S.E.2d 528 (2001).

4. Insurance

Insurance policy. — Defendant insurers were entitled to summary judgment

because plaintiff insured's affirmance of a disability income policy with a merger clause precluded any reliance on the alleged pre-contractual misrepresentations and barred the claims for fraud and for violations of O.C.G.A. § 16-14-4(a)-(c), and because the insured alleged no facts to show that the insurers had a duty independent of their contract duties to state a claim for tortious interference with property rights. *Worsham v. Provident Cos.*, 249 F. Supp. 2d 1325 (N.D. Ga. 2002).

Illegal sale of insurance is not in and of itself a basis for a civil RICO action, but it may serve as such if it was conducted in violation of federal mail and wire fraud statutes or if it was proven to have been a fraud amounting to theft. *Olukoya v. American Ass'n of Cab Cos.*, 219 Ga. App. 508, 465 S.E.2d 715 (1995).

Recovery not available. — Even if an insurance company engaged in a mail and wire fraud scheme to avoid compliance with state laws and illegally sell insurance without properly appointing agents, an insured could not recover in a civil action under the Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq., without showing a connection between an insured's injury and the predicate acts. *Security Life Ins. Co. v. Clark*, 229 Ga. App. 593, 494 S.E.2d 388 (1997), aff'd in part and rev'd in part, 270 Ga. 165, 509 S.E.2d 602 (1998).

Evidence insufficient for conspiracy by insurance company. — Financial planner's cause of action against the insurance company for conspiracy to commit violations of the Georgia Racketeer Influenced and Corrupt Organizations Act, specifically O.C.G.A. § 16-14-4(c), was dismissed because: (1) the planner's allegations were insufficient to allege that the insurance company knowingly and willfully joined a conspiracy which intended to commit two predicate acts in furtherance of a common, unlawful scheme; (2) the insurance company could not have knowingly and willfully conspired to steal the planner's chose of action because the company was not even aware of the terms of the settlement agreement; and (3) the planner failed to allege particular facts which demon-

strated that the insurance company knowingly and willfully conspired with the parent company and the subsidiary to commit mail fraud in order to steal from the

planner. *Rosen v. Protective Life Ins. Co.*, No. 1:09-cv-03620-WSD, 2010 U.S. Dist. LEXIS 50392 (N.D. Ga. May 20, 2010).

RESEARCH REFERENCES

Am. Jur. Trials. — Appeal of a Federal Mail Fraud Conviction, 42 Am. Jur. Trials 1.

16-14-5. Criminal penalties for violation of Code Section 16-14-4.

(a) Any person convicted of the offense of engaging in activity in violation of Code Section 16-14-4 is guilty of a felony and shall be punished by not less than five nor more than 20 years' imprisonment or the fine specified in subsection (b) of this Code section, or both.

(b) In lieu of any fine otherwise authorized by law, any person convicted of the offense of engaging in conduct in violation of Code Section 16-14-4 may be sentenced to pay a fine that does not exceed the greater of \$25,000.00 or three times the amount of any pecuniary value gained by him from such violation.

(c) The court shall hold a hearing to determine the amount of the fine authorized by subsection (b) of this Code section.

(d) For the purposes of subsection (b) of this Code section, "pecuniary value" means:

(1) Anything of value in the form of money, a negotiable instrument, a commercial interest, or anything else, the primary significance of which is economic advantage; or

(2) Any other property or service that has a value in excess of \$100.00. (Code 1933, § 26-3404, enacted by Ga. L. 1980, p. 405, § 1; Ga. L. 1985, p. 149, § 16.)

JUDICIAL DECISIONS

When both alleged conspiracy and actual violation of O.C.G.A. § 16-14-4(b) charged the same acts, committed at the same time, by the same persons, as part of the same transactions, the count subjected the defendant to one conviction and one punishment. *Washington v. State*, 183 Ga. App. 422, 359 S.E.2d 198 (1987).

Cited in *Russell Corp. v. BancBoston Fin. Co.*, 209 Ga. App. 660, 434 S.E.2d 716 (1993); *McGee v. State*, 255 Ga. App. 708, 566 S.E.2d 431 (2002); *Williams Gen. Corp. v. Stone*, 279 Ga. 428, 614 S.E.2d 758 (2005).

16-14-6. Available civil remedies.

(a) Any superior court may, after making due provisions for the rights of innocent persons, enjoin violations of Code Section 16-14-4 by issuing appropriate orders and judgments including, but not limited to:

(1) Ordering any defendant to divest himself of any interest in any enterprise, real property, or personal property;

(2) Imposing reasonable restrictions upon the future activities or investments of any defendant including, but not limited to, prohibiting any defendant from engaging in the same type of endeavor as the enterprise in which he was engaged in violation of Code Section 16-14-4;

(3) Ordering the dissolution or reorganization of any enterprise;

(4) Ordering the suspension or revocation of any license, permit, or prior approval granted to any enterprise by any agency of the state; or

(5) Ordering the forfeiture of the charter of a corporation organized under the laws of this state or the revocation of a certificate authorizing a foreign corporation to conduct business within this state upon a finding that the board of directors or a managerial agent acting on behalf of the corporation, in conducting affairs of the corporation, has authorized or engaged in conduct in violation of Code Section 16-14-4 and that, for the prevention of future criminal activity, the public interest requires that the charter of the corporation be forfeited and that the corporation be dissolved or the certificate be revoked.

(b) Any aggrieved person or the state may institute a proceeding under subsection (a) of this Code section. In such proceeding, relief shall be granted in conformity with the principles that govern the granting of injunctive relief from threatened loss or damage in other civil cases, provided that no showing of special or irreparable damage to the person shall have to be made. Upon the execution of proper bond against damages for an injunction improvidently granted and a showing of immediate danger of significant loss or damage, a temporary restraining order and a preliminary injunction may be issued in any such action before a final determination on the merits.

(c) Any person who is injured by reason of any violation of Code Section 16-14-4 shall have a cause of action for three times the actual damages sustained and, where appropriate, punitive damages. Such person shall also recover attorneys' fees in the trial and appellate courts and costs of investigation and litigation reasonably incurred. The defendant or any injured person may demand a trial by jury in any civil action brought pursuant to this Code section.

(d) Any injured person shall have a right or claim to forfeited property or to the proceeds derived therefrom superior to any right or claim the state or the county (other than for costs) has in the same property or proceeds. To enforce such a claim, the injured person must intervene in the forfeiture proceeding prior to its final disposition.

(e) A conviction in any criminal proceeding under this chapter shall estop the defendant in any subsequent civil action or proceeding as to all matters proved in the criminal proceeding. (Code 1933, § 26-3406, enacted by Ga. L. 1980, p. 405, § 1.)

Law reviews. — For article, “The Civil Jurisdiction of State and Magistrate Courts,” see 24 Ga. St. B.J. 29 (1987). For article, “A Comprehensive Analysis of

Georgia RICO,” see 9 Georgia St. U.L. Rev. 537 (1993). For article, “Theories of Stockbroker and Brokerage Firm Liability,” see 9 Ga. St. B.J. 12 (2004).

JUDICIAL DECISIONS

Legislative purpose not element of cause of action. — Expression of legislative purpose in enacting O.C.G.A. Ch. 14, T. 16 is not an element of a civil cause of action under RICO. *State v. Shearson Lehman Bros.*, 188 Ga. App. 120, 372 S.E.2d 276 (1988); *Reaugh v. Inner Harbour Hosp.*, 214 Ga. App. 259, 447 S.E.2d 617 (1994).

O.C.G.A. Ch. 14, T. 16 requires the plaintiff to allege an organized crime nexus. *Georgia Gulf Corp. v. Ward*, 701 F. Supp. 1556 (N.D. Ga. 1987).

Subsection (c). — Authorization of recovery of post-trial attorney fees and costs in O.C.G.A. § 16-14-6(c) does not violate equal protection, due process, or chill the rights of litigants seeking appellate review. *Dee v. Sweet*, 268 Ga. 346, 489 S.E.2d 823 (1997).

Standing. — Party indirectly injured by Racketeer Influenced and Corrupt Organizations (RICO), O.C.G.A. § 16-14-1 et seq., offense, lacks standing to bring a RICO claim. *Morast v. Lance*, 631 F. Supp. 474 (N.D. Ga. 1986), *aff'd*, 807 F.2d 926 (11th Cir. 1987).

National bank vice president, who was discharged for reporting an irregular transaction to the comptroller of the currency, was not entitled to relief under O.C.G.A. Ch. 14, T. 16, since the vice president was not fired because of a refusal to participate in the bank's illegal scheme and, consequently, the vice presi-

dent's injury did not flow directly from the banking violations. *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987).

Bond. — Because officers failed to move in the trial court for the state to post a bond under the Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-6(b), the officers' claim that the trial court erred in not requiring the state to post a bond would not be considered on appeal; the officers did move for the receiver to post a bond, but the trial court had discretion whether or not to require the receiver to give a bond conditioned for the faithful discharge of the trust reposed, O.C.G.A. § 9-8-10, and the trial court did not abuse that discretion. *Pittman v. State*, 288 Ga. 589, 706 S.E.2d 398 (2011).

Sufficiency of complaint. — Complaint which alleges that the plaintiff was injured as a result of the defendant having committed at least two similar or interrelated predicate offenses shall survive a motion to dismiss for failure to state a claim. *State v. Shearson Lehman Bros.*, 188 Ga. App. 120, 372 S.E.2d 276 (1988).

Preponderance of evidence required. — In a civil action under the Georgia RICO Act, O.C.G.A. § 16-14-1 et seq., given the similarities in the purpose and language of the federal and Georgia RICO statutes, together with the General Assembly's mandate to liberally construe the Act to effectuate its remedial pur-

poses, under O.C.G.A. § 16-14-2(b), the applicable standard of proof in state civil RICO actions was held to be a preponderance of the evidence; thus, the Supreme Court of Georgia overruled *Simpson Consulting, Inc. v. Barclays Bank PLC*, 227 Ga. App. 648 (490 SE2d 184) (1997), and those other cases holding to the contrary, specifically, *Blanton v. Bank of America*, 256 Ga. App. 103 (2002), *In re Copelan*, 250 Ga. App. 856 (2001), and *Tronitec, Inc. v. Shealy*, 249 Ga. App. 442 (2001). *Williams Gen. Corp. v. Stone*, 279 Ga. 428, 614 S.E.2d 758 (2005).

Trial court erred in a bifurcated suit asserting a claim of illegal insurance sales under the Georgia Racketeer Influenced and Corrupt Organizations Act (Georgia RICO), O.C.G.A. § 16-14-1 et seq., by instructing the jury that the suing passenger of a cab was required to prove the asserted Georgia RICO claims against two cab companies by clear and convincing evidence as the proper standard of proof to have been applied was a preponderance of the evidence. *Am. Ass'n of Cab Cos. v. Parham*, 291 Ga. App. 33, 661 S.E.2d 161 (2008), cert. denied, 2008 Ga. LEXIS 690, 728 (Ga. 2008).

Preclusion. — When victims of a fraudulent scheme who sued the perpetrator of the fraud under the Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq., had previously unsuccessfully sued the perpetrator for fraud and related claims, judgment n.o.v. was properly entered in favor of the perpetrator because the victims' claim was barred by res judicata and collateral estoppel, as it should have been raised in their previous suits against the perpetrator, which involved the same parties and the same subject matter. *Austin v. Cohen*, 268 Ga. App. 650, 602 S.E.2d 146 (2004).

Remedy at law does not preclude injunctive relief. — Even if the plaintiff had a remedy at law in the form of money damages for breach of contract, a preliminary injunction was proper when issued in accordance with O.C.G.A. § 16-14-6. *Cotton, Inc. v. Phil-Dan Trucking, Inc.*, 270 Ga. 95, 507 S.E.2d 730 (1998).

Proof required for treble damages. — In an action based on a violation of

O.C.G.A. § 16-10-20, prohibiting the making of false statements, even though plaintiff had to show the defendants' criminal acts injured plaintiff to recover treble damages, plaintiff's inability to show that plaintiff was actually misled by the false statements was not fatal. *Maddox v. Southern Eng'g Co.*, 216 Ga. App. 6, 453 S.E.2d 70 (1994).

Attorney fees. — In light of the practical difficulties required in allocating attorney fees to specific claims in Racketeer Influenced and Corrupt Organizations Act (RICO), O.C.G.A. § 16-14-1 et seq., cases, it will not be required unless the unsuccessful claims and those not receiving awards of attorney fees are distinctly different claims for relief, based on different facts and legal theories. *Dee v. Sweet*, 218 Ga. App. 18, 460 S.E.2d 110 (1995).

Damages award of \$1.00 was sufficient to justify the award of attorney fees. *Dee v. Sweet*, 218 Ga. App. 18, 460 S.E.2d 110 (1995).

Prevailing plaintiffs in a RICO action could recover attorney fees and costs related to the investigation and litigation of actions necessary to collect on the RICO judgment they were awarded. *Dee v. Sweet*, 268 Ga. 346, 489 S.E.2d 823 (1997).

Plain language of O.C.G.A. § 16-14-6(c) makes it clear that the statutory award of attorneys' fees represents a separate and distinct interest awarded to compensate each injured plaintiff individually. *Darden v. Ford Consumer Fin. Co.*, 200 F.3d 753 (11th Cir. 2000).

Each plaintiff's share of the attorneys' fees recoverable under Georgia's RICO statute, O.C.G.A. § 16-14-1 et seq., may not be aggregated to satisfy the amount-in-controversy requirement because under Georgia law each individual plaintiff has a separate and distinct statutory right or claim to recover those attorneys' fees, and Georgia law provides that those fees are to compensate the injured plaintiff. *Darden v. Ford Consumer Fin. Co.*, 200 F.3d 753 (11th Cir. 2000).

Arbitration agreements' class action waiver was valid and enforceable because the arbitration agreements expressly permitted the borrower/plaintiff and the other consumers to recover attorneys' fees

and expenses “if allowed by statute or applicable law” and such relief was available under the applicable law, Georgia’s Racketeering Influenced and Corrupt Organizations Act, specifically O.C.G.A. § 16-14-6(c). *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868 (11th Cir. 2005), cert. denied, 546 U.S. 1214, 126 S. Ct. 1457, 164 L. Ed. 2d 132 (2006).

Exhaustion of administrative remedies. — Allegation of Insurance Code violations does not transform a civil RICO complaint into a cause of action which must be pursued exclusively through administrative channels, particularly when numerous other predicate acts are alleged in the complaint including fraud. *Provident Indem. Life Ins. Co. v. James*, 234 Ga. App. 403, 506 S.E.2d 892 (1998).

Bankruptcy. — State racketeering action against the family of a debtor based on a property transfer to avoid debt collection was not property of a bankruptcy estate because a trustee stood in the shoes of the debtor, who could not have asserted the action against the family due to a role as a coconspirator. *Johnson v. Flatau* (In re Stewart), 329 B.R. 910 (Bankr. M.D. Ga. 2005), aff’d, 339 Bankr. 524 (M.D. Ga. 2006).

Automatic stay did not prohibit a state

racketeering action brought against the family of a debtor relating to the transfer of property to avoid debt collection because a judgment against the family would not have been in effect a judgment against the estate; the family was not entitled to indemnity from the estate. *Johnson v. Flatau* (In re Stewart), 329 B.R. 910 (Bankr. M.D. Ga. 2005), aff’d, 339 Bankr. 524 (M.D. Ga. 2006).

Treble damages and attorneys fees awarded. — Internet service provider’s success on both the provider’s federal and state RICO claims each independently mandated the trebling of the provider’s damages, including the provider’s attorneys fees, under 18 U.S.C. § 1964(c) and O.C.G.A. § 16-14-6(c), respectively, against an individual who had stolen Internet accounts in order to engage in unlawful spamming and spoofing activities. *Earthlink, Inc. v. Carmack*, 2003 U.S. Dist. LEXIS 9963 (N.D. Ga. May 7, 2003).

Cited in *Doxie v. Ford Motor Credit Co.*, 603 F. Supp. 624 (S.D. Ga. 1984); *Johnson v. Fleet Fin., Inc.*, 785 F. Supp. 1003 (S.D. Ga. 1992); *Blalock v. Anneewakee, Inc.*, 206 Ga. App. 676, 426 S.E.2d 165 (1992); *Dale v. Comcast Corp.*, 498 F.3d 1216 (11th Cir. 2007); *Cisco v. State*, 285 Ga. 656, 680 S.E.2d 831 (2009).

16-14-7. Forfeiture proceedings.

(a) All property of every kind used or intended for use in the course of, derived from, or realized through a pattern of racketeering activity is subject to forfeiture to the state. Forfeiture shall be had by a civil procedure known as a RICO forfeiture proceeding under the following rules.

(b) A RICO forfeiture proceeding shall be governed by Chapter 11 of Title 9, the “Georgia Civil Practice Act,” except to the extent that special rules of procedure are stated in this chapter.

(c) A RICO forfeiture proceeding shall be an in rem proceeding against the property.

(d) A RICO forfeiture proceeding shall be instituted by complaint and prosecuted by the district attorney of the county in which the property is located or seized. The proceeding may be commenced before or after seizure of the property.

(e) If the complaint is filed before seizure, it shall state what property is sought to be forfeited, that the property is within the jurisdiction of

the court, the grounds for forfeiture, and the names of all persons known to have or claim an interest in the property. The court shall determine *ex parte* whether there is reasonable cause to believe that the property is subject to forfeiture and that notice to those persons having or claiming an interest in the property prior to seizure would cause the loss or destruction of the property. If the court finds that reasonable cause does not exist to believe the property is subject to forfeiture, it shall dismiss the complaint. If the court finds that reasonable cause does exist to believe the property is subject to forfeiture but there is not reasonable cause to believe that prior notice would result in loss or destruction, it shall order service on all persons known to have or claim an interest in the property prior to a further hearing on whether a writ of seizure should issue. If the court finds that there is reasonable cause to believe that the property is subject to forfeiture and to believe that prior notice would cause loss or destruction, it shall without any further hearing or notice issue a writ of seizure directing the sheriff of the county where the property is found to seize it.

(f) Seizure may be effected by a law enforcement officer authorized to enforce the penal laws of this state prior to the filing of the complaint and without a writ of seizure if the seizure is incident to a lawful arrest, search, or inspection and the officer has probable cause to believe the property is subject to forfeiture and will be lost or destroyed if not seized. Within ten days of the date of seizure, the seizure shall be reported by the officer to the district attorney of the circuit in which the seizure is effected; and the district attorney shall, within a reasonable time after receiving notice of seizure, file a complaint for forfeiture. The complaint shall state, in addition to the information required in subsection (e) of this Code section, the date and place of seizure.

(g) After the complaint is filed or the seizure effected, whichever is later, every person known to have or claim an interest in the property shall be served, if not previously served, with a copy of the complaint and a notice of seizure in the manner provided by Chapter 11 of Title 9, the "Georgia Civil Practice Act." Service by publication may be ordered upon any party whose whereabouts cannot be determined.

(h)(1) Any person claiming an interest in the property may become a party to the action at any time prior to judgment whether named in the complaint or not. Any party claiming a substantial interest in the property may upon motion be allowed by the court to take possession of the property upon posting bond with good and sufficient security in double the amount of the property's value conditioned to pay the value of any interest in the property found to be subject to forfeiture or the value of any interest of another not subject to forfeiture. Such a party taking possession shall not remove the property from the

territorial jurisdiction of the court without written permission from the court.

(2) The court may, upon such terms and conditions as prescribed by it, order that the property be sold by an innocent party who holds a lien on or security interest in the property at any time during the proceedings. Any proceeds from such sale over and above the amount necessary to satisfy the lien or security interest shall be paid into court pending final judgment in the forfeiture proceeding. No such sale shall be ordered, however, unless the obligation upon which the lien or security interest is based is in default.

(3) Pending final judgment in the forfeiture proceeding, the court may make any other disposition of the property which is in the interest of substantial justice.

(i) After service of process, all further proceedings shall be as provided in Chapter 11 of Title 9, the "Georgia Civil Practice Act," except that any party may bring one motion to dismiss at any time and such motion shall be heard and ruled on within ten days. Any party may demand a jury trial.

(j) The interest of an innocent party in the property shall not be subject to forfeiture. An innocent party is one who did not have actual or constructive knowledge that the property was subject to forfeiture.

(k) Subject to the requirement of protecting the interest of all innocent parties, the court may, after judgment of forfeiture, make any of the following orders for disposition of the property:

(1) Destruction of contraband, the possession of which is illegal;

(2) Retention for official use by any agency of this state or any political subdivision thereof. When such agency or political subdivision no longer has use for such property, it shall be disposed of by judicial sale;

(3) Transfer to the Division of Archives and History of property useful for historical or instructional purposes;

(4) Retention of the property by any innocent party having an interest therein, upon payment or approval of a plan for payment into court of the value of any forfeited interest in the property. The plan may include, in the case of an innocent party who holds a lien on or security interest in the property, the sale of the property by the innocent party under such terms and conditions as may be prescribed by the court and the payment into court of any proceeds from such sale over and above the amount necessary to satisfy the lien or security interest;

(5) Judicial sale of the property;

(6) Transfer of the property to any innocent party having an interest therein equal to or greater than the value of the property; or

(7) Any other disposition of the property which is in the interest of substantial justice and adequately protects innocent parties.

(l) The net proceeds of any sale or disposition after satisfaction of the interest of any innocent party, less the greater of one-half thereof or the costs borne by the county in bringing the forfeiture action, shall be paid into the general fund of the state treasury. The costs borne by the county or one-half of the net proceeds of sale or disposition, whichever is greater, shall be paid into the treasury of the county where the forfeiture action is brought. Notwithstanding any other provision in this Code section, the court may, after satisfaction of the interest of any innocent party, make any other division of the proceeds among the state, county, or municipalities or agencies of the state, county, or municipalities, which is commensurate with the proportion of the assistance that each contributed to the underlying criminal action, forfeiture, or criminal action and forfeiture.

(m) In lieu of the provisions of subsections (c) through (g) of this Code section, the state may bring an in personam action for the forfeiture of any property subject to forfeiture under subsection (a) of this Code section.

(n)(1) Upon the entry of a final judgment of forfeiture in favor of the state, the title of the state to the forfeited property shall:

(A) In the case of real property or beneficial interest, relate back to the date of filing of the RICO lien notice in the official records of the county where the real property or beneficial trust is located and, if no RICO lien notice is filed, then to the date of the filing of any notice of lis pendens under Article 9 of Chapter 14 of Title 44 in the official records of the county where the real property or beneficial interest is located and, if no RICO lien notice or notice of lis pendens is so filed, then to the date of recording of the final judgment of forfeiture in the official records of the county where the real property or beneficial interest is located; and

(B) In the case of personal property, relate back to the date the personal property was seized by the investigating agency.

(2) If property subject to forfeiture is conveyed, alienated, disposed of, or otherwise rendered unavailable for forfeiture after the filing of a RICO lien notice or after the filing of a civil proceeding or criminal proceeding, whichever is earlier, the investigative agency may, on behalf of the state, institute an action in the appropriate superior court against the person named in the RICO lien notice or the defendant in the civil proceeding or criminal proceeding; and the

court shall enter final judgment against the person named in the RICO lien notice or the defendant in the civil proceeding or criminal proceeding in an amount equal to the fair market value of the property, together with investigative costs and attorney's fees incurred by the investigative agency in the action. If a civil proceeding is pending, such action shall be filed only in the court where such civil proceeding is pending. (Code 1933, § 26-3405, enacted by Ga. L. 1980, p. 405, § 1; Ga. L. 1982, p. 1385, §§ 4, 5, 10, 11; Ga. L. 1984, p. 22, § 16; Ga. L. 1992, p. 6, § 16; Ga. L. 2000, p. 1114, § 1; Ga. L. 2002, p. 532, § 4.)

Law reviews. — For articles discussing attorney fee forfeitures under federal RICO provisions, see 36 Emory L.J. 755 et

seq. (1987). For article, "A Comprehensive Analysis of Georgia RICO," see 9 Ga. St. U.L. Rev. 537 (1993).

JUDICIAL DECISIONS

Constitutionality. — O.C.G.A. § 16-14-7 is constitutional on its face, as the search must be pursuant to a warrant, incident to a lawful arrest, or in the presence of other exigent circumstances which would render the search or inspection "lawful." *Waller v. State*, 251 Ga. 124, 303 S.E.2d 437 (1983), rev'd on other grounds, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

Law enforcement officials are not given unbridled discretion to search for evidence of illegal activity under O.C.G.A. § 16-14-7, and seizure of documents under that section presented no conflicts with warrant requirements or the Fourth Amendment since the documents were instrumentalities of crime; as such, O.C.G.A. § 16-14-7 is not unconstitutional on the statute's face. *Ledesma v. State*, 251 Ga. 885, 311 S.E.2d 427, cert. denied, 467 U.S. 1241, 104 S. Ct. 3510, 82 L. Ed. 2d 819 (1984).

In an in personam forfeiture proceeding, pursuant to the Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-7(m), a trial court erred by finding that the civil procedural rules set forth in the Georgia Civil Practice Act, O.C.G.A. § 9-11-1 et seq., were an adequate substitute for the substantive constitutional rights to which the property owners were entitled. As a result, the Supreme Court of Georgia held that § 16-14-7(m) was unconstitutional because the law deprived in personam forfeiture defendants of the

safeguards of criminal procedure guaranteed by the United States and Georgia Constitutions. *Cisco v. State*, 285 Ga. 656, 680 S.E.2d 831 (2009).

Temporary injunction. — Trial court did not err in finding that Racketeer Influenced Corrupt Organizations indictment provided reasonable cause to believe that property identified in the indictment was subject to forfeiture and in entering a temporary injunction because the existence of an indictment charging the defendant with a RICO violation is both a fact and a finding by the grand jury that there is probable cause to believe that a crime in violation of RICO has been committed by the defendant. *Caldwell v. State*, 253 Ga. 400, 321 S.E.2d 704 (1984).

Trial court erred in not granting defendant's motion to dissolve a temporary injunction and dismiss a receiver where Racketeer Influenced Corrupt Organizations, O.C.G.A. § 16-14-1 et seq., counts in indictments were dismissed, and prosecutor declined to present evidence of RICO violations sufficient to allow trial court to make a finding of reasonable cause to believe the property at issue was subject to forfeiture. *Caldwell v. State*, 253 Ga. 400, 321 S.E.2d 704 (1984).

Property acquired with racketeering proceeds is subject to forfeiture though inoffensive of itself. *Western Bus. Sys. v. Slaton*, 492 F. Supp. 513 (N.D. Ga. 1980).

Seizure of property unrelated to its character or content. — Forfeiture can

apply to any chattel whatever, if the chattel was acquired with the proceeds of racketeering; thus, if items seized are books or movie films, the seizure is totally unrelated to their contents; the books or films would be forfeited under the statute not because of any likelihood of obscenity, but because the books or films were personal property realized through or derived from crime. *Western Bus. Sys. v. Slaton*, 492 F. Supp. 513 (N.D. Ga. 1980).

Seizure prior to filing complaint must be based on probable cause. — Law enforcement officer authorized by O.C.G.A. § 16-14-7 to seize materials prior to filing of complaint, seizes them upon probable cause to believe that they were subject to forfeiture, and not upon the officer's personal judgment that objects are obscene. *Western Bus. Sys. v. Slaton*, 492 F. Supp. 513 (N.D. Ga. 1980).

Allegation that defendant has an association with organized crime unnecessary. — Because the Georgia Racketeering Influenced and Corrupt Organizations (RICO) Act, O.C.G.A. § 16-14-1 et seq., was enacted after the federal RICO Act and contains substantially the same language as the federal act, the United States District Court, N.D. Georgia, concludes that a Georgia court, if confronted with the issue, would follow federal court decisions interpreting the federal RICO Act and decide that failure to allege an association with organized crime is not fatal to a Georgia RICO claim. *Stanton v. Shearson Lehman/American Express, Inc.*, 622 F. Supp. 293 (N.D. Ga. 1985).

Prerequisite to destruction of contraband under paragraph (k)(1). — Destruction of contraband authorized by former Code 1933, § 26-3405 must follow a judgment of forfeiture and an additional determination by the court that items in question were contraband, possession of which was illegal. *Western Bus. Sys. v. Slaton*, 492 F. Supp. 513 (N.D. Ga. 1980) (see O.C.G.A. § 16-14-7(k)(1)).

Seized property subsequently released by state. — State began proceedings to condemn certain property, pursuant to the provisions of the Georgia Racketeer Influenced and Corrupt Organizations Act (RICO), O.C.G.A. § 16-14-1 et seq., and specifically O.C.G.A. § 16-14-7, but subsequently filed a release of the state's RICO lien. There was no cognizable claim under the theory that private property was taken or damaged for public purposes without just and adequate compensation being first paid. The state did not apply any of the property to public use during the period it was in the state's possession and, even assuming arguendo that the seizure resulted in a violation of state and/or federal constitutional rights, there was no basis upon which the state itself, as opposed to the state's officers, could be held liable for monetary damages on the basis of it. *Kelleher v. State*, 187 Ga. App. 64, 369 S.E.2d 341 (1988).

Fifth Amendment claim denied. — Denial of an accused's motion for a protective order under O.C.G.A. § 9-11-26(c) was affirmed as the Fifth Amendment could not be used to justify a protective order to stay all discovery in the accused's civil forfeiture proceeding under O.C.G.A. § 16-14-7 pending the conclusion of the accused's criminal Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq., case; while the privilege against self-incrimination extends to answers creating a "real and appreciable" danger of establishing a link in the chain of evidence needed to prosecute, the trial court has to determine if the answers could incriminate the witness, and if the trial court determines that the answers could not incriminate the witness, the witness has to testify or be subject to the court's sanction. *Chumley v. State of Ga.*, 282 Ga. App. 117, 637 S.E.2d 828 (2006).

Cited in *Doxie v. Ford Motor Credit Co.*, 603 F. Supp. 624 (S.D. Ga. 1984).

RESEARCH REFERENCES

ALR. — Necessity of conviction of offense associated with property seized in order to support forfeiture of property to state or local authorities, 38 ALR4th 515.

Forfeiture of homestead based on criminal activity conducted on premises—state cases, 16 ALR5th 855.

Propriety of civil or criminal forfeiture of computer hardware or software, 39 ALR5th 87.

16-14-8. Period of limitations as to criminal or civil proceedings under this chapter.

Notwithstanding any other provision of law, a criminal or civil action or proceeding under this chapter may be commenced up until five years after the conduct in violation of a provision of this chapter terminates or the cause of action accrues. If a criminal prosecution or civil action is brought by the state to punish or prevent any violation of this chapter, then the running of this period of limitations, with respect to any cause of action arising under subsection (b) or (c) of Code Section 16-14-6 which is based upon any matter complained of in such prosecution or action by the state, shall be suspended during the pendency of the prosecution or action by the state and for two years thereafter. (Code 1933, § 26-3407, enacted by Ga. L. 1980, p. 405, § 1.)

Law reviews. — For article, “A Comprehensive Analysis of Georgia RICO,” see 9 Georgia St. U.L. Rev. 537 (1993).

JUDICIAL DECISIONS

Limitations start for state racketeering suit. — In a state civil RICO suit, the statute of limitations begins to run from the time that the cause of action accrues, and not from the time that the racketeering activity terminates. *Blalock v. Anneewakee, Inc.*, 206 Ga. App. 676, 426 S.E.2d 165 (1992).

Civil RICO cause of action accrues when the plaintiff discovers, or reasonably should have discovered, that plaintiff has been injured and that plaintiff's injury is part of a pattern. *Cobb County v. Jones Group*, 218 Ga. App. 149, 460 S.E.2d 516 (1995).

Tolling of statute. — Pursuant to O.C.G.A. § 17-3-2(2), the statute of limitation for criminal prosecution of RICO violations was tolled up to the time the victim and the state first learned of the predicate offenses. *Adams v. State*, 231 Ga. App. 279, 499 S.E.2d 105 (1998).

Claim time-barred. — Claim by a

partnership against the partnership's former managing partner was time-barred under O.C.G.A. § 16-14-8 since the partnership should have known about the alleged racketeering by 1993 at the latest, when several partners began to question the former partner about partnership checks that the former partner had written to the former partner; the “separate accrual rule” did not apply because there was no new and independent injury. *Cochran Mill Assocs. v. Stephens*, 286 Ga. App. 241, 648 S.E.2d 764 (2007).

Trial court did not err by dismissing an indictment charging the defendants with racketeering violations and conspiracy as the state failed to prove that an overt act in furtherance of the conspiracy occurred less than five years from the date of the indictment. *State v. Conzo*, 293 Ga. App. 72, 666 S.E.2d 404 (2008).

Cited in *Radcliffe v. Founders Title Co.*, 720 F. Supp. 170 (M.D. Ga. 1989).

RESEARCH REFERENCES

ALR. — Commencement of limitation period for criminal prosecution under Racketeer Influenced and Corrupt Organizations Act (RICO), (18 USCS §§ 1961-1968), 89 ALR Fed. 887.

16-14-9. Civil remedies as supplemental and not mutually exclusive.

The application of one civil remedy under this chapter shall not preclude the application of any other remedy, civil or criminal, under this chapter or any other provision of law. Civil remedies under this chapter are supplemental and not mutually exclusive. (Code 1933, § 26-3408, enacted by Ga. L. 1980, p. 405, § 1.)

JUDICIAL DECISIONS

Fraud and RICO actions. — Since the requisite predicate acts in the insureds' Racketeer Influenced and Corrupt Organizations (RICO) Act, O.C.G.A. § 16-14-1 et seq., claim could stand alone as a separate cause of action for fraud, the jury found the insurer guilty of both fraud and RICO violations, and because the insurer did not challenge the form of the verdict on appeal, its claim that the insureds' fraud claim was barred by the election of remedies doctrine was rejected. *St. Paul Fire & Marine Ins. Co. v. Clark*, 255 Ga. App. 14, 566 S.E.2d 2 (2002).

When each of the victims of a fraudu-

lent scheme sued the perpetrator for fraud and related claims, the victims could have also sued the perpetrator under the Georgia Racketeer Influenced and Corrupt Organizations Act (RICO), O.C.G.A. § 16-14-1 et seq., in the same action, and the victims should have raised such a claim in those actions because, when the victims did not, and lost the victims' suits against the perpetrator, the victims were barred by collateral estoppel and res judicata from filing RICO claims against the perpetrator at a later time. *Austin v. Cohen*, 268 Ga. App. 650, 602 S.E.2d 146 (2004).

16-14-10. Recognition and enforcement of judgments of other states; reciprocal agreements with other states.

(a) Notwithstanding any other provision of law, a valid judgment rendered by a court of a jurisdiction having a law substantially similar to this chapter will be recognized and enforced by the courts of this state to the extent that a judgment rendered by a court of this state pursuant to this chapter would be enforced in such other jurisdiction.

(b) The Attorney General is authorized to enter into reciprocal agreements with the attorney general or chief prosecuting attorney of any jurisdiction having a law substantially similar to this chapter so as to further the purposes of this chapter. (Code 1933, § 26-3409, enacted by Ga. L. 1982, p. 1385, § 6; Code 1981, § 16-14-10, enacted by Ga. L. 1982, p. 1385, § 12.)

JUDICIAL DECISIONS

Legislative intent. — General Assembly's intent is to foster cooperation between law enforcement agencies as necessary to the prosecution of organized crime.

Waller v. State, 251 Ga. 124, 303 S.E.2d 437 (1983), rev'd on other grounds, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

16-14-11. Venue.

In any criminal proceeding brought pursuant to this chapter, the crime shall be considered to have been committed in any county in which an incident of racketeering occurred or in which an interest or control of an enterprise or real or personal property is acquired or maintained. (Code 1933, § 26-3410, enacted by Ga. L. 1982, p. 1385, § 6; Code 1981, § 16-14-11, enacted by Ga. L. 1982, p. 1385, § 12.)

JUDICIAL DECISIONS

Venue adequately shown. — Defendants' RICO convictions under O.C.G.A. § 16-14-4 were upheld on appeal as sufficient evidence was presented that at least one predicate act of the conspiracy took place in Newton County, Georgia; moreover, any error in instructing the jury that the jury could find venue in any county where interest or control of an enterprise

or property was acquired or maintained lacked merit. *Graham v. State*, 282 Ga. App. 576, 639 S.E.2d 384 (2006).

Cited in *Chancey v. State*, 256 Ga. 415, 349 S.E.2d 717 (1986); *Davitte v. State*, 238 Ga. App. 720, 520 S.E.2d 239 (1999); *Brannon v. State*, 243 Ga. App. 28, 530 S.E.2d 761 (2000).

16-14-12. Cases of special public importance.

This state may, in any civil action brought pursuant to this chapter, file with the clerk of the superior court a certificate stating that the case is of special public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or, in his absence, the presiding chief judge of the superior court in which such action is pending; and, upon receipt of such copy, the judge shall immediately designate a judge to hear and determine the action. The judge so designated shall promptly assign such action for hearing, participate in the hearings and determination, and cause the action to be expedited. (Code 1933, § 26-3411, enacted by Ga. L. 1982, p. 1385, § 6; Code 1981, § 16-14-12, enacted by Ga. L. 1982, p. 1385, § 12.)

16-14-13. Filing and attachment of lien notice.

(a) Upon the institution of any civil proceeding, the investigative agency then or at any time during the pendency of the proceeding may file in the official records of any one or more counties a RICO lien notice. No filing fee or other charge shall be required as a condition for filing the RICO lien notice; and the clerk of the superior court shall, upon the

presentation of a RICO lien notice, immediately record it in the official records.

(b) The RICO lien notice shall be signed by the Attorney General or his designee or by a district attorney or his designee. The notice shall be in such form as the Attorney General prescribes and shall set forth the following information:

(1) The name of the person against whom the civil proceeding has been brought. In its discretion, the investigative agency may also name in the RICO lien notice any other aliases, names, or fictitious names under which the person may be known. In its discretion, the investigative agency may also name in the RICO lien notice any corporation, partnership, or other entity that is either controlled by or entirely owned by the person;

(2) If known to the investigative agency, the present residence and business addresses of the person named in the RICO lien notice and of the other names set forth in the RICO lien notice;

(3) A reference to the civil proceeding stating that a proceeding under this chapter has been brought against the person named in the RICO lien notice, the name of the county or counties where the proceeding has been brought, and, if known to the investigative agency at the time of filing the RICO lien notice, the case number of the proceeding;

(4) A statement that the notice is being filed pursuant to this chapter; and

(5) The name and address of the investigative agency filing the RICO lien notice and the name of the individual signing the RICO lien notice.

(c) A RICO lien notice shall apply only to one person and, to the extent applicable, any aliases, fictitious names, or other names, including names of corporations, partnerships, or other entities, to the extent permitted in paragraph (1) of subsection (b) of this Code section. A separate RICO lien notice shall be filed for any other person against whom the investigative agency desires to file a RICO lien notice under this Code section.

(d) The investigative agency shall, as soon as practicable after the filing of each RICO lien notice, furnish to the person named in the notice either a copy of the recorded notice or a copy of the notice with a notation thereon of the county or counties in which the notice has been recorded. The failure of the investigative agency to so furnish a copy of the notice under this subsection shall not invalidate or otherwise affect the notice.

(e) The filing of a RICO lien notice creates, from the time of its filing, a lien in favor of the state on the following property of the person named in the notice and against any other names set forth in the notice:

(1) Any real property situated in the county where the notice is filed then or thereafter owned by the person or under any of the names; and

(2) Any beneficial interest situated in the county where the notice is filed then or thereafter owned by the person or under any of the names.

(f) The lien shall commence and attach as of the time of filing of the RICO lien notice and shall continue thereafter until expiration, termination, or release pursuant to Code Section 16-14-14. The lien created in favor of the state shall be superior and prior to the interest of any other person in the real property or beneficial interest if the interest is acquired subsequent to the filing of the notice.

(g) In conjunction with any civil proceedings:

(1) The investigative agency may file without prior court order in any county a lis pendens and, in such case, any person acquiring an interest in the subject real property or beneficial interest, if the real property or beneficial interest is acquired subsequent to the filing of lis pendens, shall take the interest subject to the civil proceeding and any subsequent judgment of forfeiture; and

(2) If a RICO lien notice has been filed, the investigative agency may name as defendants, in addition to the person named in the notice, any persons acquiring an interest in the real property or beneficial interest subsequent to the filing of the notice. If a judgment of forfeiture is entered in the proceeding in favor of the state, the interest of any person in the property that was acquired subsequent to the filing of the notice shall be subject to the notice and judgment of forfeiture.

(h)(1) A trustee who acquires actual knowledge that a RICO lien notice or a civil proceeding or criminal proceeding has been filed against any person for whom he holds legal or record title to real property shall immediately furnish to the investigative agency the following:

(A) The name and address of the person, as known to the trustee;

(B) The name and address, as known to the trustee, of all other persons for whose benefit the trustee holds title to the real property; and

(C) If requested by the investigative agency, a copy of the trust agreement or other instrument pursuant to which the trustee holds legal or record title to the real property.

(2) Any trustee who fails to comply with the provisions of this subsection is guilty of a misdemeanor.

(i) Any trustee who conveys title to real property for which a RICO lien notice has been filed at the time of the conveyance in the county where the real property is situated naming a person who, to the actual knowledge of the trustee, holds a beneficial interest in the trust shall be liable to the state for the greater of:

(1) The amount of proceeds received directly by the person named in the RICO lien notice as a result of the conveyance;

(2) The amount of proceeds received by the trustee as a result of the conveyance and distributed to the person named in the RICO lien notice; or

(3) The fair market value of the interest of the person named in the RICO lien notice in the real property so conveyed; however, if the trustee conveys the real property and holds the proceeds that would otherwise be paid or distributed to the beneficiary or at the direction of the beneficiary or his designee, the trustee's liability shall not exceed the amount of the proceeds so held for so long as the proceeds are held by the trustee.

(j) The filing of a RICO lien notice shall not constitute a lien on the record title to real property as owned by the trustee except to the extent the trustee is named in the RICO lien notice. The investigative agency may bring a civil proceeding in any superior court against the trustee to recover from the trustee the amounts set forth in subsection (i), and the state shall also be entitled to recover investigative costs and attorney's fees incurred by the investigative agency.

(k) The filing of a RICO lien notice shall not affect the use to which real property or a beneficial interest owned by the person named in the RICO lien notice may be put or the right of the person to receive any avails, rents, or other proceeds resulting from the use and ownership, but not the sale, of the property until a judgment of forfeiture is entered.

(l)(1) The provisions of this Code section shall not apply to any conveyance by a trustee pursuant to a court order unless such court order is entered in an action between the trustee and the beneficiary.

(2) Unless the trustee has actual knowledge that a person owning a beneficial interest in the trust is named in a RICO lien notice or is otherwise a defendant in a civil proceeding, the provisions of this Code section shall not apply to:

(A) Any conveyance by a trustee required under the terms of any trust agreement, which trust agreement is a matter of public record prior to the filing of any RICO lien notice; or

(B) Any conveyance by a trustee to all of the persons who own a beneficial interest in the trust.

(m) All forfeitures or dispositions under this Code section shall be made with due provision for the rights of innocent persons. (Code 1933, § 26-3412, enacted by Ga. L. 1982, p. 1385, § 6; Code 1981, § 16-14-13, enacted by Ga. L. 1982, p. 1385, § 12; Ga. L. 1984, p. 22, § 16.)

Law reviews. — For article, “A Comprehensive Analysis of Georgia RICO,” see 9 Georgia St. U.L. Rev. 537 (1993).

16-14-14. Term of lien notice; release, extinguishment, or termination.

(a) The term of a RICO lien notice shall be for a period of six years from the date of filing unless a renewal RICO lien notice has been filed by the investigative agency; and, in such case, the term of the renewal RICO lien notice shall be for a period of six years from the date of its filing. The investigative agency shall be entitled to only one renewal of the RICO lien notice.

(b) The investigative agency filing the RICO lien notice may release in whole or in part any RICO lien notice or may release any specific real property or beneficial interest from the RICO lien notice upon such terms and conditions as it may determine. Any release of a RICO lien notice executed by the investigative agency may be filed in the official records of any county. No charge or fee shall be imposed for the filing of any release of a RICO lien notice.

(c) If no civil proceeding has been instituted by the investigative agency seeking a forfeiture of any property owned by the person named in the RICO lien notice, the acquittal in the criminal proceeding of the person named in the RICO lien notice or the dismissal of the criminal proceeding shall terminate the RICO lien notice; and, in such case, the filing of the RICO lien notice shall have no effect. In the event the criminal proceeding has been dismissed or the person named in the RICO lien notice has been acquitted in the criminal proceeding, the RICO lien notice shall continue for the duration of the civil proceeding.

(d) If no civil proceeding is then pending against the person named in a RICO lien notice, the person named in a RICO lien notice may institute an action against the investigative agency filing the notice in the county where the notice has been filed seeking a release or extinguishment of the notice; and, in such case:

(1) The court shall, upon the motion of such person, immediately enter an order setting a date for hearing, which date shall be not less than five nor more than ten days after the action has been filed; and the order, along with a copy of the complaint, shall be served on the investigative agency within three days after the institution of the action. At the hearing, the court shall take evidence on the issue of whether any real property or beneficial interest owned by such person is covered by the RICO lien notice or otherwise subject to forfeiture under this chapter; and, if such person shows by the preponderance of the evidence that the RICO lien notice is not applicable to him or that any real property or beneficial interest owned by him is not subject to forfeiture under this chapter, the court shall enter a judgment extinguishing the RICO lien notice or releasing the real property or beneficial interest from the RICO lien notice;

(2) The court shall immediately enter its order releasing from the RICO lien notice any specific real property or beneficial interest if a sale of the real property or beneficial interest is pending and the filing of the notice prevents the sale of the property or interest; however, the proceeds resulting from the sale of the real property or beneficial interest shall be deposited into the registry of the court, subject to the further order of the court; and

(3) At the hearing set forth in paragraph (1), the court may release from the RICO lien notice any real property or beneficial interest upon the posting by such person of such security as is equal to the value of the real property or beneficial interest owned by such person.

(e) In the event a civil proceeding is pending against a person named in a RICO lien notice, the court, upon motion by said person, may grant the relief set forth in this Code section. (Code 1933, § 26-3413, enacted by Ga. L. 1982, p. 1385, § 6; Code 1981, § 16-14-14, enacted by Ga. L. 1982, p. 1385, § 12; Ga. L. 1996, p. 6, § 16.)

JUDICIAL DECISIONS

Investment in activity not required. — Unlike its federal counterpart, O.C.G.A. § 16-14-14 does not require the investment of racketeering income in an enterprise. A private action exists under Georgia RICO for a person injured by

reason of another's merely acquiring money through a pattern of racketeering; the Georgia statute does not require investment of that income in an enterprise. Georgia ex rel. Bowers v. Dairymen, Inc., 813 F. Supp. 1580 (S.D. Ga. 1991).

16-14-15. Acquisition of record of real property by alien corporation.

(a) Each alien corporation desiring to acquire of record any real property shall have, prior to acquisition, and shall continuously main-

tain in this state during any year thereafter in which such real property is owned by the alien corporation:

(1) A registered office; and

(2) A registered agent, which agent may be either:

(A) An individual resident in this state whose business office is identical with such registered office; or

(B) Another corporation authorized to transact business in this state having a business office identical with such registered office.

(b) Each registered agent appointed pursuant to this Code section, on whom process may be served, shall file a statement in writing with the Secretary of State accepting the appointment as registered agent simultaneously with being designated.

(c) Each alien corporation shall file with the Secretary of State an annual registration setting forth:

(1) The name of the alien corporation and the country under whose law it is incorporated;

(2) The mailing address of the principal office of the alien corporation;

(3) The name and mailing address of each officer and each director of the alien corporation;

(4) The name and street address of the registered agent and registered office of the alien corporation; and

(5) The signature of the corporate president, vice-president, secretary, assistant secretary, or treasurer attesting to the accuracy of the report as of the date the annual registration is executed on behalf of the corporation.

(d) The first annual registration must be delivered to the Secretary of State between January 1 and April 1, or such other date as the Secretary of State may specify by rules or regulations, of the year following a calendar year in which an alien corporation filed its initial application pursuant to subsection (a) of this Code section. Subsequent annual registrations must be delivered to the Secretary of State between January 1 and April 1, or such other date as the Secretary of State may specify by rules or regulations, of the following calendar years.

(e) For filing reports required pursuant to this Code section, the Secretary of State shall collect a filing fee as set out in Code Section 14-2-122 for the filing of annual registrations.

(f) If an annual registration does not contain the information required by this Code section, the Secretary of State shall promptly notify

the reporting domestic, foreign, or alien corporation in writing and return the report to it for correction. If the report is corrected to contain the information required by this Code section and delivered to the Secretary of State within 30 days after the effective date of notice, it is deemed to be timely filed.

(g) The Secretary of State shall record the status of any alien corporation that fails to comply with the requirements of this Code section.

(h) Each alien corporation that fails to file a report as required by subsection (c) of this Code section or fails to maintain a registered office and a registered agent as required by subsection (a) of this Code section shall not be entitled to own, purchase, or sell any real property and shall not be entitled to bring an action or defend in the courts of the state until such requirements have been complied with.

(i) The filing of a report by a corporation as required by subsection (c) of this Code section shall be solely for the purposes of this chapter and, notwithstanding Code Section 14-2-510 or any other relevant law, shall not be used as a determination of whether the corporation is actually doing business in this state. (Code 1933, § 26-3414, enacted by Ga. L. 1982, p. 1385, § 6; Code 1981, § 16-14-15, enacted by Ga. L. 1982, p. 1385, § 12; Ga. L. 1984, p. 22, § 16; Ga. L. 1989, p. 946, § 110; Ga. L. 1990, p. 322, § 1.)

JUDICIAL DECISIONS

O.C.G.A. § 16-14-15 is not a recording statute which would permit a bona fide purchaser of real property to take the property free of the interest of a non-complying alien corporation and, thus, a bona fide purchaser of real prop-

erty has no standing under that section to challenge the validity of a security deed held by a non-complying alien corporation. *Five Star Partners v. Vincent Netherlands Properties*, 169 Bankr. 994 (Bankr. N.D. Ga. 1994).

OPINIONS OF THE ATTORNEY GENERAL

Purpose behind requirement of O.C.G.A. § 16-14-15(c)(5) is to ensure that information contained in report is reasonably current, and is satisfied if the annual report is mailed immediately after signing and received by the Secretary of State shortly thereafter. 1982 Op. Att'y Gen. No. 82-89.

Suspension of reporting requirement. — If an alien corporation no longer owns property in Georgia and does not intend to acquire new property, it need not file any annual reports beginning with the year following the sale of property. 1982 Op. Att'y Gen. No. 82-89.

Officers of alien corporation. — When an alien corporation does not have at least one officer similar to those described in O.C.G.A. § 16-14-15(c)(5), the alien corporation may submit a report signed and attested to by the corporation's board of directors or one of the corporation's counterparts of the designated officers listed in paragraph (c)(5) who, regardless of title, are charged with such authority under the corporation's charter. 1982 Op. Att'y Gen. No. 82-89.

Duty of Secretary of State's office as to allegedly deficient report. — O.C.G.A. § 16-14-15 does not authorize

the Secretary of State's office to refuse to file a report which it considers deficient; if the Secretary of State concludes that a report does not meet requirements of

these provisions, it should record the status of any alien corporation failing to so comply. 1982 Op. Att'y Gen. No. 82-89.

CHAPTER 15

STREET GANG TERRORISM AND PREVENTION

Sec.		Sec.	
16-15-1.	Short title.	16-15-8.	Matters proved in criminal trial.
16-15-2.	Legislative findings and intent.	16-15-9.	Commission of offense admissible as evidence of existence of criminal street gang and criminal gang activity.
16-15-3.	Definitions.	16-15-10.	Criminal Street Gang Reward Fund.
16-15-4.	Participation in criminal gang activity prohibited.	16-15-11.	Georgia Criminal Street Gang Database; uniform reporting format; confidentiality.
16-15-5.	Contraband; seizure and forfeiture.		
16-15-6.	Local ordinances not preempted by state law.		
16-15-7.	Real property used by criminal street gangs declared public nuisance; abatement; persons injured by gangs entitled to treble damages.		

Cross references. — Domestic terrorism, § 16-4-10.

Law reviews. — For note on 1992

enactment of this chapter, see 9 Georgia St. U.L. Rev. 219 (1992).

16-15-1. Short title.

This chapter shall be known and may be cited as the “Georgia Street Gang Terrorism and Prevention Act.” (Code 1981, § 16-15-1, enacted by Ga. L. 1992, p. 3236, § 1; Ga. L. 1998, p. 270, § 8.)

Law reviews. — For review of 1998 legislation relating to crimes and offenses, see 15 Georgia St. U.L. Rev. 80 (1998).

JUDICIAL DECISIONS

No constitutional right to be in a gang. — Appellant, a juvenile, was not entitled to the dismissal of two counts of street gang criminal activity based on the juvenile’s contention that the Georgia Street Gang Terrorism and Prevention Act, O.C.G.A. § 16-15-1 et seq., was overbroad because the statute criminalized the constitutionally protected freedom of association; criminal gang activity was not a protected activity even when committed by a group exercising the group’s constitutional right to free association. In re K.R.S., 284 Ga. 853, 672 S.E.2d 622 (2009).

Constitutionality. — Trial court properly denied the appellants’ motion to dismiss various counts charging the appellants with gang-related crimes under the Georgia Street Gang Terrorism and Prevention Act, O.C.G.A. § 16-15-1 et seq., since properly construed O.C.G.A. § 16-15-4(a) did not directly or indirectly infringe upon the First Amendment right to freedom of association as, to support a conviction, gang conduct or participation was required. Further, reading § 16-15-4(a) according to the natural and obvious import of the statute’s language and in conjunction with the specific defi-

nitions in O.C.G.A. § 16-15-3, the statute provided a sufficiently definite warning to persons of ordinary intelligence of the prohibited conduct and was not susceptible to arbitrary and discriminatory enforcement and did not reach a substantial amount of constitutionally protected conduct, thus, the statute was not unconstitutionally vague or overbroad. *Rodriguez v. State*, 284 Ga. 803, 671 S.E.2d 497 (2009).

Construction with O.C.G.A. § 42-9-39. — There is no legal authority to support the proposition that the Georgia Street Gang and Terrorism Prevention

Act, O.C.G.A. § 16-15-1 et seq., and O.C.G.A. § 42-9-39, two very differently worded statutory provisions, are equivalent; thus, defendant's argument that, as a matter of law, if the armed robbery of September 17, 1999, and the murder of December 28, 1999, are considered as part of the "pattern of criminal street gang activity" for purposes of violating the Street Gang Act, the actions must necessarily also be considered "offenses occurring in the same series of acts" within the meaning of O.C.G.A. § 42-9-39(c) failed. *Seabolt v. State*, 279 Ga. 518, 616 S.E.2d 448 (2005).

16-15-2. Legislative findings and intent.

(a) The General Assembly finds and declares that it is the right of every person to be secure and protected from fear, intimidation, and physical harm caused by the activities of violent groups and individuals. It is not the intent of this chapter to interfere with the exercise of the constitutionally protected rights of freedom of expression and association. The General Assembly recognizes the constitutional right of every citizen to harbor and express beliefs on any lawful subject whatsoever, to associate lawfully with others who share similar beliefs, to petition lawfully constituted authority for a redress of perceived grievances, and to participate in the electoral process.

(b) The General Assembly, however, further finds that the State of Georgia is in a state of crisis which has been caused by violent criminal street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods. These activities, both individually and collectively, present a clear and present danger to public order and safety and are not constitutionally protected.

(c) The General Assembly finds that there are criminal street gangs operating in Georgia and that the number of gang related murders is increasing. It is the intent of the General Assembly in enacting this chapter to seek the eradication of criminal activity by criminal street gangs by focusing upon criminal gang activity and upon the organized nature of criminal street gangs which together are the chief source of terror created by criminal street gangs.

(d) The General Assembly further finds that an effective means of punishing and deterring the criminal activities of criminal street gangs is through forfeiture of the profits, proceeds, and instrumentalities acquired, accumulated, or used by criminal street gangs. (Code 1981, § 16-15-2, enacted by Ga. L. 1992, p. 3236, § 1; Ga. L. 1995, p. 933,

§ 13; Ga. L. 1996, p. 6, § 16; Ga. L. 1998, p. 270, § 8; Ga. L. 2010, p. 230, § 1/HB 1015.)

The 2010 amendment, effective July 1, 2010, inserted “criminal” preceding “street gangs” six times throughout this Code section; and deleted “patterns of” preceding “criminal gang activity” in the second sentence of subsection (c).

16-15-3. Definitions.

As used in this chapter, the term:

(1) “Criminal gang activity” means the commission, attempted commission, conspiracy to commit, or solicitation, coercion, or intimidation of another person to commit any of the following offenses on or after July 1, 2006:

(A) Any offense defined as racketeering activity by Code Section 16-14-3;

(B) Any offense defined in Article 7 of Chapter 5 of this title, relating to stalking;

(C) Any offense defined in Code Section 16-6-1 as rape, 16-6-2 as aggravated sodomy, 16-6-3 as statutory rape, or 16-6-22.2 as aggravated sexual battery;

(D) Any offense defined in Article 3 of Chapter 10 of this title, relating to escape and other offenses related to confinement;

(E) Any offense defined in Article 4 of Chapter 11 of this title, relating to dangerous instrumentalities and practices;

(F) Any offense defined in Code Section 42-5-15, 42-5-16, 42-5-17, 42-5-18, or 42-5-19, relating to the security of state or county correctional facilities;

(G) Any offense defined in Code Section 49-4A-11, relating to aiding or encouraging a child to escape from custody;

(H) Any offense of criminal trespass or criminal damage to property resulting from any act of gang related painting on, tagging, marking on, writing on, or creating any form of graffiti on the property of another;

(I) Any criminal offense committed in violation of the laws of the United States or its territories, dominions, or possessions, any of the several states, or any foreign nation which, if committed in this state, would be considered criminal gang activity under this Code section; and

(J) Any criminal offense in the State of Georgia, any other state, or the United States that involves violence, possession of a weapon,

or use of a weapon, whether designated as a felony or not, and regardless of the maximum sentence that could be imposed or actually was imposed.

(2) “Criminal street gang” means any organization, association, or group of three or more persons associated in fact, whether formal or informal, which engages in criminal gang activity as defined in paragraph (1) of this Code section. The existence of such organization, association, or group of individuals associated in fact may be established by evidence of a common name or common identifying signs, symbols, tattoos, graffiti, or attire or other distinguishing characteristics, including, but not limited to, common activities, customs, or behaviors. Such term shall not include three or more persons, associated in fact, whether formal or informal, who are not engaged in criminal gang activity. (Code 1981, § 16-15-3, enacted by Ga. L. 1992, p. 3236, § 1; Ga. L. 1998, p. 270, § 8; Ga. L. 1999, p. 81, § 16; Ga. L. 2006, p. 519, § 1/HB 1302; Ga. L. 2010, p. 230, § 2/HB 1015.)

The 2010 amendment, effective July 1, 2010, added “, including, but not limited to, common activities, customs, or behaviors” at the end of the second sentence of paragraph (2).

Editor’s notes. — Ga. L. 2006, p. 519, § 7, not codified by the General Assembly, provided that the 2006 amendment shall

be effective July 1, 2006, and shall be applicable to all crimes committed on or after such date, and also provided that: “Any offense committed before July 1, 2006, shall be punishable as provided by the statute in effect at the time the offense was committed.”

JUDICIAL DECISIONS

Provision not unconstitutionally vague. — O.C.G.A. § 16-15-3(1)(I) is not unconstitutionally vague as a plain reading of the subsection indicates that a defendant charged with violating the provision has to do more than commit a criminal offense; the defendant’s conduct must also come within one of the defined categories of criminal gang activity enumerated in § 16-15-31(1)(A)-(H), (J), and the description of those crimes together with their correlating statutory provisions in the criminal code provide sufficient notice to the ordinary citizen and clear guidance to law enforcement authorities as to what conduct is forbidden. In re K.R.S., 284 Ga. 853, 672 S.E.2d 622 (2009).

Constitutionality. — Trial court properly denied the appellants’ motion to dismiss various counts charging the appellants with gang-related crimes under the

Georgia Street Gang Terrorism and Prevention Act, O.C.G.A. § 16-15-1 et seq., since properly construed O.C.G.A. § 16-15-4(a) did not directly or indirectly infringe upon the First Amendment right to freedom of association as, to support a conviction, gang conduct or participation was required. Further, reading § 16-15-4(a) according to the natural and obvious import of the statute’s language and in conjunction with the specific definitions in O.C.G.A. § 16-15-3, the statute provided a sufficiently definite warning to persons of ordinary intelligence of the prohibited conduct and was not susceptible to arbitrary and discriminatory enforcement and did not reach a substantial amount of constitutionally protected conduct, thus, the statute was not unconstitutionally vague or overbroad. Rodriguez v. State, 284 Ga. 803, 671 S.E.2d 497 (2009).

Affray in violation of O.C.G.A. § 16-11-32 meets the definition of criminal gang activity in O.C.G.A. § 16-15-3(1)(J). — Offense of affray meets the definition of criminal gang activity under O.C.G.A. § 16-15-3(1)(J) because the fact that the combatants consent to fight does not negate that fighting is an act of violence. *In re X. W.*, 301 Ga. App. 625, 688 S.E.2d 646 (2009).

Indictment insufficient when state unable to identify dates. — Trial court did not err in granting the defendants' special demurrer to an indictment charging the defendants with participating in criminal street gang activity in violation of the Georgia Street Gang Terrorism and Prevention Act, O.C.G.A. § 16-15-1 et seq., because absent some showing by the state that the state's evidence did not permit the state to identify the exact dates the gang came into existence, the indictment was imperfect and subject to special demurrer; although in most cases of this type it may not be possible for the state to show an exact date a criminal street gang came into existence, it is nevertheless incumbent upon the state to make some showing as to why the state can not determine that date, and ultimately, while the state may in fact be unable to pinpoint the particular dates of the alleged crimes, an appellate court cannot speculate about such a matter, but instead, the appellate court, like the trial court, is bound by the record before the court. *State v. Hood*, 307 Ga. App. 439, 706 S.E.2d 566 (2010).

Proof of a pattern of criminal gang activity was not established by the testimony of a police officer whose information was not based on first hand knowledge and by the testimony of another witness concerning crimes that were not shown to have been committed during the relevant time period. *Green v. State*, 266 Ga. 237, 466 S.E.2d 577 (1996).

Gang activity evidence sufficient. — Evidence was sufficient to convict defendant on a charge of gang activity as it showed the commission of two or more enumerated offenses, including robbery and terroristic threats, that the offenses occurred after a specified statutory date, and that the offenses were committed by two or more persons after defendant and

two other assailants abducted the victim, robbed the victim, and threatened to commit a violent act on the victim. *Fulcher v. State*, 259 Ga. App. 648, 578 S.E.2d 264 (2003).

Defendant juvenile was properly found to have committed the crime of participation in criminal street gang activity under O.C.G.A. § 16-15-4(a) because the evidence supported a finding that the defendant was part of a criminal street gang under O.C.G.A. § 16-15-3(2) based on the colors the defendant wore and the statement as to the removal of a gang tattoo and because the defendant committed the enumerated offenses of carrying a concealed weapon and theft by shoplifting as referenced by O.C.G.A. §§ 16-14-3 and 16-15-3 and apparently stole a flare gun with the intent to further gang activity. *In the Interest of C.P.*, 296 Ga. App. 572, 675 S.E.2d 287 (2009).

Evidence was sufficient to support the defendant's conviction of participation in criminal street gang activity. The evidence showed that the defendant was a member of an established street gang; additionally, the evidence that the defendant committed simple battery and less than a week later committed aggravated assault and aggravated battery against rival gang members showed a pattern of criminal gang activity. *Lopez v. State*, 297 Ga. App. 618, 677 S.E.2d 776 (2009), overruled on other grounds, *State v. Gardner*, 286 Ga. 633, 690 S.E.2d 164 (2010).

Delinquency petition properly charged that a juvenile participated in criminal street gang activity pursuant to O.C.G.A. § 16-15-4(e) because the petition stated that the juvenile did engage in, directly or indirectly, criminal gang activity, a crime of violence in the State of Georgia, as defined in O.C.G.A. § 16-15-3(1)(J), and the juvenile was also adjudicated delinquent for organizing and promoting an affray in violation of O.C.G.A. § 16-11-32, which fell within the criminal conduct contemplated by O.C.G.A. § 16-15-3(1)(J); the juvenile instructed a student on becoming a gang member, organized a fight for the student, and gave the student a booklet containing gang history and jargon, and there was also evidence that the student paid the juve-

nile a “gang tax” and that the juvenile referenced being a lieutenant in the gang. In re X. W., 301 Ga. App. 625, 688 S.E.2d 646 (2009).

Evidence was sufficient to support the juvenile court’s finding that a juvenile committed an act which, had the juvenile been an adult, would have resulted in a conviction of participation in criminal street gang activity because the juvenile and gang investigator for a police depart-

ment testified about the juvenile’s familiarity with the gang and stated that there were more than three members of the gang, and a student testified that the juvenile facilitated an affray to further a gang activity, specifically the student’s membership in the gang. In re X. W., 301 Ga. App. 625, 688 S.E.2d 646 (2009).

Cited in Veal v. State, 242 Ga. App. 873, 531 S.E.2d 422 (2000).

16-15-4. Participation in criminal gang activity prohibited.

(a) It shall be unlawful for any person employed by or associated with a criminal street gang to conduct or participate in criminal gang activity through the commission of any offense enumerated in paragraph (1) of Code Section 16-15-3.

(b) It shall be unlawful for any person to commit any offense enumerated in paragraph (1) of Code Section 16-15-3 with the intent to obtain or earn membership or maintain or increase his or her status or position in a criminal street gang.

(c) It shall be unlawful for any person to acquire or maintain, directly or indirectly, through criminal gang activity or proceeds derived therefrom any interest in or control of any real or personal property of any nature, including money.

(d) It shall be unlawful for any person who occupies a position of organizer, supervisory position, or any other position of management or leadership with regard to a criminal street gang to engage in, directly or indirectly, or conspire to engage in criminal gang activity.

(e) It shall be unlawful for any person to cause, encourage, solicit, recruit, or coerce another to become a member or associate of a criminal street gang, to participate in a criminal street gang, or to conduct or participate in criminal gang activity.

(f) It shall be unlawful for any person to communicate, directly or indirectly, with another any threat of injury or damage to the person or property of the other person or of any associate or relative of the other person with the intent to deter such person from assisting a member or associate of a criminal street gang to withdraw from such criminal street gang.

(g) It shall be unlawful for any person to communicate, directly or indirectly, with another any threat of injury or damage to the person or property of the other person or of any associate or relative of the other person with the intent to punish or retaliate against such person for having withdrawn from a criminal street gang.

(h) It shall be unlawful for any person to communicate, directly or indirectly, with another any threat of injury or damage to the person or property of the other person or of any associate or relative of the other person with the intent to punish or retaliate against such person for refusing to or encouraging another to refuse to become or obtain the status of a member or associate of a criminal street gang.

(i) It shall be unlawful for any person to communicate, directly or indirectly, with another any threat of injury or damage to the person or property of the other person or of any associate or relative of the other person with the intent to punish or retaliate against such person for providing statements or testimony against criminal street gangs or any criminal street gang member or associate.

(j) In addition to the prohibitions set forth in Code Section 16-10-93, it shall be unlawful for any person to communicate, directly or indirectly, with another any threat of injury or damage to the person or property of the other person or of any associate or relative of the other person with the intent to intimidate, deter, or prevent such person from communicating to any law enforcement or corrections officer, prosecuting attorney, or judge information relating to criminal street gangs, criminal street gang members or associates, or criminal gang activity.

(k)(1) Any person who violates subsection (a), (b), or (c) of this Code section shall, in addition to any other penalty imposed by law, be punished by imprisonment for not less than five nor more than 15 years or by a fine of not less than \$10,000.00 nor more than \$15,000.00, or both.

(2) Any person who violates subsection (d) of this Code section may, in addition to any other penalty provided by law, be punished by imprisonment for an additional ten years which shall be served consecutively to any other sentence imposed on such person by law.

(3) Any person who violates subsection (e), (f), (g), (h), (i), or (j) of this Code section shall, in addition to any other penalty provided by law, be punished by imprisonment for not less than three nor more than ten years.

(l) In addition to any other penalty provided by this Code section, all sentences imposed under this Code section shall require as a special condition of the sentence that the person sentenced shall not knowingly have contact of any kind or character with any other member or associate of a criminal street gang, shall not participate in any criminal gang activity, and, in cases involving a victim, shall not knowingly have contact of any kind or character with any such victim or any member of any such victim's family or household.

(m) Any crime committed in violation of this Code section shall be considered a separate offense. (Code 1981, § 16-15-4, enacted by Ga. L.

1992, p. 3236, § 1; Ga. L. 1998, p. 270, § 8; Ga. L. 2006, p. 519, § 2/HB 1302; Ga. L. 2010, p. 230, § 3/HB 1015; Ga. L. 2011, p. 752, § 16/HB 142.)

The 2010 amendment, effective July 1, 2010, deleted “street” preceding “gang activity” in subsection (a); deleted former subsection (b); redesignated former subsections (c) through (h) as present subsections (b) through (g), respectively; inserted “obtain or earn membership or” in present subsection (b); inserted “or leadership” in present subsection (d); in present subsection (e), inserted “recruit,” and “become a member or associate of a criminal street gang, to”, and added “, or to conduct or participate in criminal gang activity” at the end; substituted “of any” for “to any” in the middle of present subsections (f) and (g); added subsections (h) through (j); redesignated former subsection (i) as present subsection (k); substituted “subsection (a), (b), or (c)” for “subsection (a), (b), (c), or (d)” in present paragraph (k)(1); substituted “subsection (d)” for “subsection (e)” in present para-

graph (k)(2); substituted “subsection (e), (f), (g), (h), (i) or (j)” for “subsection (f), (g), or (h)” in present paragraph (k)(3); added subsection (l); and redesignated former subsection (j) as present subsection (m).

The 2011 amendment, effective May 13, 2011, part of an Act to revise, modernize, and correct the Code, revised punctuation in paragraph (k)(3).

Editor’s notes. — Ga. L. 2006, p. 519, § 7/HB 1302, not codified by the General Assembly, provided that the 2006 amendment shall be effective July 1, 2006, and shall be applicable to all crimes committed on or after such date, and also provided that: “Any offense committed before July 1, 2006, shall be punishable as provided by the statute in effect at the time the offense was committed.”

Law reviews. — For annual survey of criminal law, see 56 Mercer L. Rev. 153 (2004).

JUDICIAL DECISIONS

Constitutionality. — Trial court properly denied the appellants’ motion to dismiss various counts charging the appellants with gang-related crimes under the Georgia Street Gang Terrorism and Prevention Act, O.C.G.A. § 16-15-1 et seq., since properly construed O.C.G.A. § 16-15-4(a) did not directly or indirectly infringe upon the First Amendment right to freedom of association as, to support a conviction, gang conduct or participation was required. Further, reading § 16-15-4(a) according to the natural and obvious import of the statute’s language and in conjunction with the specific definitions in O.C.G.A. § 16-15-3, the statute provided a sufficiently definite warning to persons of ordinary intelligence of the prohibited conduct and was not susceptible to arbitrary and discriminatory enforcement and did not reach a substantial amount of constitutionally protected conduct, thus, the statute was not unconstitutionally vague or overbroad. *Rodriguez v. State*, 284 Ga. 803, 671 S.E.2d 497 (2009).

Construction with O.C.G.A. § 42-9-39. — There is no legal authority to support the proposition that the Georgia Street Gang and Terrorism Prevention Act, O.C.G.A. § 16-15-1 et seq., and O.C.G.A. § 42-9-39, two very differently worded statutory provisions, are equivalent; thus, defendant’s argument that, as a matter of law, if the armed robbery of September 17, 1999, and the murder of December 28, 1999, are considered as part of the “pattern of criminal street gang activity” for purposes of violating the Street Gang Act, they must necessarily also be considered “offenses occurring in the same series of acts” within the meaning of O.C.G.A. § 42-9-39(c) failed. *Seabolt v. State*, 279 Ga. 518, 616 S.E.2d 448 (2005).

Statute is not unconstitutionally vague. — Appellant, a juvenile, was not entitled to the dismissal of two counts of street gang activity based on the juvenile’s assertion that O.C.G.A. § 16-15-4(a) failed to inform ordinary citizens of what associations with a criminal street gang

were prohibited under the statute; the statute required that a defendant's association with a group be active and include the commission of an enumerated offense under O.C.G.A. § 16-15-13(1), and that provided a sufficiently definite warning to persons of ordinary intelligence of the prohibited conduct. In re K.R.S., 284 Ga. 853, 672 S.E.2d 622 (2009).

Indictment sufficient. — It was not necessary for an indictment for violations of O.C.G.A. § 16-15-4(a) of the Georgia Street Gang Terrorism and Prevention Act, O.C.G.A. § 16-15-1 et seq., to contain a specific allegation that the gang existed prior to the commission of any of the enumerated offenses; the indictment tracked the language of the statute and gave a date certain for each of the enumerated offenses. State v. Hood, No. A10A1050, 2010 Ga. App. LEXIS 1138 (Dec. 15, 2010).

Indictment insufficient when state unable to identify dates. — Trial court did not err in granting the defendants' special demurrer to an indictment charging the defendants with participating in criminal street gang activity in violation of the Georgia Street Gang Terrorism and Prevention Act, O.C.G.A. § 16-15-4, because absent some showing by the state that the state's evidence did not permit the state to identify the exact dates the gang came into existence, the indictment was imperfect and subject to special demurrer; although in most cases of this type it may not be possible for the state to show an exact date a criminal street gang came into existence, it is nevertheless incumbent upon the state to make some showing as to why the state can not determine that date, and ultimately, while the state may in fact be unable to pinpoint the particular dates of the alleged crimes, an appellate court cannot speculate about such a matter, but instead, the appellate court, like the trial court, is bound by the record before the court. State v. Hood, 307 Ga. App. 439, 706 S.E.2d 566 (2010).

Indictment not required to allege date the gang came into existence. — Indictment for criminal street gang activity under O.C.G.A. § 16-15-4(a) was sufficient to withstand 12 defendants' general and special demurrers. Although the

indictment did not allege a date that the gang came into existence, the indictment sufficiently alleged that the gang existed at the time of each of the enumerated predicate offenses. State v. Hood, 307 Ga. App. 439, 706 S.E.2d 566 (2010).

Evidence sufficient for conviction. — Evidence was sufficient for conviction under former paragraph (b)(1) based on defendant's statement at the sheriff's office that the robbery and killing of the victim was undertaken in furtherance of defendant's participation in a criminal street gang, for the purpose of increasing defendant's own rank and influence within the gang, and to perpetuate the gang and its rank structure. Jackson v. State, 272 Ga. 191, 528 S.E.2d 232 (2000); Warren v. State, 245 Ga. App. 768, 538 S.E.2d 840 (2000).

Defendant juvenile was properly found to have committed the crime of participation in criminal street gang activity under O.C.G.A. § 16-15-4(a) because the evidence supported a finding that the defendant was part of a criminal street gang under O.C.G.A. § 16-15-3(2) based on the colors the defendant wore and the statement as to the removal of a gang tattoo and because the defendant committed the enumerated offenses of carrying a concealed weapon and theft by shoplifting as referenced by O.C.G.A. §§ 16-14-3(9)(A)(ix) and 16-15-3(1)(A), (J) and apparently stole a flare gun with the intent to further gang activity. In the Interest of C.P., 296 Ga. App. 572, 675 S.E.2d 287 (2009).

Evidence was sufficient to support the defendant's conviction of participation in criminal street gang activity. The evidence showed that the defendant was a member of an established street gang; additionally, the evidence that the defendant committed simple battery and less than a week later committed aggravated assault and aggravated battery against rival gang members showed a pattern of criminal gang activity. Lopez v. State, 297 Ga. App. 618, 677 S.E.2d 776 (2009), overruled on other grounds, State v. Gardner, 286 Ga. 633, 690 S.E.2d 164 (2010).

Evidence insufficient for conviction. — Evidence was insufficient to adjudicate a juvenile a delinquent for ac-

tively and willingly causing or coercing another to participate in a gang in the commission of a felony, with knowledge that the gang's members had engaged in a pattern of criminal street gang activity, under O.C.G.A. § 16-15-4(d), because there was no evidence the juvenile caused or coerced another person to participate in the commission of a crime. In the Interest of N.L.G., 267 Ga. App. 428, 600 S.E.2d 401 (2004).

Defendant's adjudication of juvenile delinquency based on a charge that the defendant was violating the terms of probation by associating with gang members had to be reversed; the state failed to prove the predicate acts of a count charging the defendant with participation in criminal street gang activity, and the state admitted that the probation violation count did not contain sufficient factual details to inform the defendant of the nature of the offense charged. In the Interest of L.J.L., 284 Ga. App. 801, 645 S.E.2d 371 (2007).

Evidence of gang activity. — State's failure to indict defendant under the statute did not bar the introduction of gang related evidence. There is no requirement that the state charge a defendant with violating the prohibition of participation in criminal street gang activity in order to admit otherwise relevant evidence of gang activity. *Wolfe v. State*, 273 Ga. 670, 544 S.E.2d 148 (2001).

Delinquency petition properly charged that a juvenile participated in criminal street gang activity pursuant to O.C.G.A. § 16-15-4(e) because the petition stated that the juvenile did engage in, directly or indirectly, criminal gang activity, a crime of violence in the State of Georgia, as defined in O.C.G.A. § 16-15-3(1)(J), and the juvenile was also adjudicated delinquent for organizing and promoting an affray in violation of O.C.G.A. § 16-11-32, which fell within the criminal conduct contemplated by O.C.G.A. § 16-15-3(1)(J); the juvenile instructed a student on becoming a gang member, or-

ganized a fight for the student, and gave the student a booklet containing gang history and jargon, and there was also evidence that the student paid the juvenile a "gang tax" and that the juvenile referenced being a lieutenant in the gang. *In re X. W.*, 301 Ga. App. 625, 688 S.E.2d 646 (2009).

Evidence was sufficient to support the juvenile court's finding that a juvenile committed an act which, had the juvenile been an adult, would have resulted in a conviction of participation in criminal street gang activity because the juvenile and gang investigator for a police department testified about the juvenile's familiarity with the gang and stated that there were more than three members of the gang, and a student testified that the juvenile facilitated an affray to further a gang activity, specifically the student's membership in the gang. *In re X. W.*, 301 Ga. App. 625, 688 S.E.2d 646 (2009).

There was sufficient evidence to support the defendant juvenile's adjudication of delinquency for participation in criminal street gang activity in violation of O.C.G.A. § 16-15-4 because the evidence established that the defendant was a gang member and that there was a nexus between the shooting and an intent to further gang activity; the defendant admitted that the defendant was a member of the gang, and a police detective, who was qualified as an expert in gang investigations, testified that the defendant was a known member of the gang, that the defendant had previously admitted to the detective that the defendant was a member of that gang, that a black bandana was attire associated with the gang, and that wearing such a bandana during a shooting was particularly significant because the bandana proclaimed to the world that the defendant was a member and that the shooting was a gang act. *In the Interest of D. M.*, 307 Ga. App. 751, 706 S.E.2d 683 (2011).

Cited in *Veal v. State*, 242 Ga. App. 873, 531 S.E.2d 422 (2000).

16-15-5. Contraband; seizure and forfeiture.

(a) The following are declared to be contraband and no person shall have a property interest in them:

(1) All property which is directly or indirectly used or intended for use in any manner to facilitate a violation of this chapter; and

(2) Any property constituting or derived from gross profits or other proceeds obtained from a violation of this chapter.

(b) In any action under this Code section, the court may enter such restraining orders or take other appropriate action, including acceptance of performance bonds, in connection with any interest that is subject to forfeiture.

(c) Within 60 days of the date of the seizure of contraband pursuant to this Code section, the district attorney shall initiate a forfeiture proceeding as provided in Code Section 16-13-49. An owner or interest holder, as defined by subsection (a) of Code Section 16-13-49, may establish as a defense to the forfeiture of property which is subject to forfeiture under this Code section the applicable provisions of subsection (e) or (f) of Code Section 16-13-49. Property which is forfeited pursuant to this Code section shall be disposed of as provided in Code Section 16-13-49 and the proceeds of such disposition shall be paid to the Criminal Justice Coordinating Council for use in funding gang prevention projects. (Code 1981, § 16-15-5, enacted by Ga. L. 1992, p. 3236, § 1; Ga. L. 1993, p. 91, § 16; Ga. L. 1998, p. 270, § 8.)

16-15-6. Local ordinances not preempted by state law.

Nothing in this chapter shall prevent a local governing body from adopting and enforcing ordinances relating to gangs and gang violence which are consistent with this chapter. Where local laws duplicate or supplement the provisions of this chapter, this chapter shall be construed as providing alternative remedies and not as preempting the field. (Code 1981, § 16-15-6, enacted by Ga. L. 1992, p. 3236, § 1; Ga. L. 1998, p. 270, § 8.)

Editor's notes. — Ga. L. 1998, p. 270, § 8, effective April 1, 1998, repealed former Code Section 16-15-6, pertaining to exemption of labor organization activi-

ties, and renumbered former Code Section 16-15-7 as present Code Section 16-15-6. The former Code section was based on Ga. L. 1992, p. 3236, § 1.

16-15-7. Real property used by criminal street gangs declared public nuisance; abatement; persons injured by gangs entitled to treble damages.

(a) Any real property which is erected, established, maintained, owned, leased, or used by any criminal street gang for the purpose of conducting criminal gang activity shall constitute a public nuisance and may be abated as provided by Title 41, relating to nuisances.

(b) An action to abate a nuisance pursuant to this Code section may be brought by the district attorney, solicitor-general, prosecuting attorney of a municipal court or city, or county attorney in any superior, state, or municipal court.

(c) Any person who is injured by reason of criminal gang activity shall have a cause of action for three times the actual damages sustained and, where appropriate, punitive damages; provided, however, that no cause of action shall arise under this subsection as a result of an otherwise legitimate commercial transaction between parties to a contract or agreement for the sale of lawful goods or property or the sale of securities regulated by Chapter 5 of Title 10 or by the federal Securities and Exchange Commission. Such person shall also recover attorney's fees in the trial and appellate court and costs of investigation and litigation reasonably incurred. All averments of a cause of action under this subsection shall be stated with particularity. No judgment shall be awarded unless the finder of fact determines that the action is consistent with the intent of the General Assembly as set forth in Code Section 16-15-2.

(d) The state, any political subdivision thereof, or any person aggrieved by a criminal street gang or criminal gang activity may bring an action to enjoin violations of this chapter in the same manner as provided in Code Section 16-14-6. (Code 1981, § 16-15-7, enacted by Ga. L. 1998, p. 270, § 8; Ga. L. 2010, p. 230, § 4/HB 1015.)

The 2010 amendment, effective July 1, 2010, substituted "criminal street gang or criminal gang activity" for "pattern of gang activity" in the middle of subsection (d).

Editor's notes. — Ga. L. 1998, p. 270, § 8, effective April 1, 1998, renumbered former Code Section 16-15-7 as present Code Section 16-15-6, and enacted this Code section.

16-15-8. Matters proved in criminal trial.

A conviction of an offense defined as criminal gang activity shall estop the defendant in any subsequent civil action or proceeding as to matters proved in the criminal proceeding. (Code 1981, § 16-15-8, enacted by Ga. L. 1998, p. 270, § 8.)

16-15-9. Commission of offense admissible as evidence of existence of criminal street gang and criminal gang activity.

The commission of any offense enumerated in paragraph (1) of Code Section 16-15-3 by any member or associate of a criminal street gang shall be admissible in any trial or proceeding for the purpose of proving the existence of the criminal street gang and criminal gang activity. (Code 1981, § 16-15-9, enacted by Ga. L. 2006, p. 519, § 3/HB 1302; Ga. L. 2010, p. 230, § 5/HB 1015.)

The 2010 amendment, effective July 1, 2010, inserted “or associate” in the middle of this Code section.

Editor’s notes. — Ga. L. 2006, p. 519, § 7/HB 1302, not codified by the General Assembly, provided that this section shall be effective July 1, 2006, and shall be

applicable to all crimes committed on or after such date, and also provided that: “Any offense committed before July 1, 2006, shall be punishable as provided by the statute in effect at the time the offense was committed.”

16-15-10. Criminal Street Gang Reward Fund.

There shall be established as part of the Prosecuting Attorneys’ Council of the State of Georgia the Criminal Street Gang Reward Fund. The chief of police, sheriff, or chairperson of any county governing authority may request the posting of up to a \$5,000.00 reward for information leading to the arrest and conviction of any person involved in criminal gang activity that leads to the death or maiming of another person or property damage in the amount of \$2,500.00 or more. (Code 1981, § 16-15-10, enacted by Ga. L. 2006, p. 519, § 3/HB 1302; Ga. L. 2010, p. 230, § 6/HB 1015.)

The 2010 amendment, effective July 1, 2010, substituted “Prosecuting Attorneys’ Council of the State of Georgia” for “Prosecuting Attorney’s Council” in the middle of the first sentence and, in the middle of the second sentence, inserted “a” preceding “\$5,000.00 reward” and deleted “street” preceding “gang”.

Editor’s notes. — Ga. L. 2006, p. 519,

§ 7/HB 1302, not codified by the General Assembly, provided that this section shall be effective July 1, 2006, and shall be applicable to all crimes committed on or after such date, and also provided that: “Any offense committed before July 1, 2006, shall be punishable as provided by the statute in effect at the time the offense was committed.”

16-15-11. Georgia Criminal Street Gang Database; uniform reporting format; confidentiality.

(a) Subject to funds as may be appropriated by the General Assembly or otherwise available for such purpose, the Georgia Bureau of Investigation shall be authorized to establish, develop, manage, and maintain a state-wide criminal street gang data base, to be known as the Georgia Criminal Street Gang Database, to facilitate the exchange of information between federal, state, county, and municipal law enforcement, prosecution and corrections agencies, offices, and departments. The Georgia Bureau of Investigation shall be authorized to solicit input from law enforcement and prosecuting attorneys in determining useful information for such data base so that information may be used by law enforcement, prosecution and corrections agencies, and other agencies, offices, and departments for investigative, prosecutorial, and corrections purposes.

(b) Once the Georgia Criminal Street Gang Database is created and operational, the Georgia Bureau of Investigation shall be authorized to notify all federal, state, county, and municipal law enforcement, pros-

ecution and corrections agencies, offices, and departments located in this state that information regarding criminal street gangs and their members and associates shall be entered into the Georgia Criminal Street Gang Database.

(c) The Georgia Bureau of Investigation shall be authorized to create and promulgate a uniform reporting format for the entry of pertinent information received from law enforcement, prosecution and corrections agencies, offices, and departments for use in the Georgia Criminal Street Gang Database.

(d) All state, county, and municipal law enforcement, prosecution and corrections agencies, offices, and departments may timely furnish information acquired relating to criminal street gangs and criminal gang activity to the Georgia Bureau of Investigation to be included in the Georgia Criminal Street Gang Database according to the reporting format developed by the Georgia Bureau of Investigation.

(e) Notwithstanding the provisions of Article 4 of Chapter 18 of Title 50, the information and related records associated with the Georgia Criminal Street Gang Database shall not be open to inspection by or made available to the public. (Code 1981, § 16-15-11, enacted by Ga. L. 2010, p. 230, § 7/HB 1015.)

Effective date. — This Code section became effective July 1, 2010.

CHAPTER 16

FORFEITURE OF PROPERTY USED IN BURGLARY OR ARMED ROBBERY

Sec.

16-16-1. Definitions.

16-16-2. Motor vehicles, tools, and weapons subject to forfeiture;

grounds for seizure; custody of property; duties of officers; proceedings for forfeiture; disposition of property.

Cross references. — Payment and disposition of fines and forfeitures, § 15-21-1 et seq. Lien of state for costs of prosecution, § 44-5-210.

Law reviews. — For note on the 1995 enactment of this chapter, see 12 Georgia St. U.L. Rev. 108 (1995).

16-16-1. Definitions.

As used in this chapter, the term:

(1) "Armed robbery" means the offense defined in subsection (a) of Code Section 16-8-41.

(2) "Burglary" means the offense defined in subsection (a) of Code Section 16-7-1. (Code 1981, § 16-16-1, enacted by Ga. L. 1995, p. 1051, § 4.)

16-16-2. Motor vehicles, tools, and weapons subject to forfeiture; grounds for seizure; custody of property; duties of officers; proceedings for forfeiture; disposition of property.

(a) All motor vehicles, tools, and weapons which are used or intended for use in any manner in the commission of or to facilitate the commission of a burglary or armed robbery are subject to forfeiture under this chapter, but:

(1) No motor vehicle used by any person as a common carrier in the transaction of business as a common carrier is subject to forfeiture under this Code section unless it appears that the owner or other person in charge of the motor vehicle is a consenting party or privy to the commission of a burglary or armed robbery;

(2) No motor vehicle is subject to forfeiture under this Code section by reason of any act or omission established by the owner thereof to have been committed or omitted without his or her knowledge or consent, and any co-owner of a motor vehicle without knowledge of or consent to the act or omission is protected to the extent of the interest of such co-owner; and

(3) A forfeiture of a motor vehicle encumbered by a bona fide security interest is subject to the interest of the secured party if he or she neither had knowledge of or nor consented to the act or omission.

(b) Property subject to forfeiture under this chapter may be seized by any law enforcement officer of this state or any political subdivision thereof who has the power to make arrests upon process issued by any court having jurisdiction over the property. Seizure without process or warrant may be made if:

(1) The seizure is incident to an arrest or a search under a search warrant;

(2) The property subject to seizure has been the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceeding based upon this chapter; or

(3) If probable cause exists that the vehicle, tool, or weapon is subject to seizure.

(c) Property taken or detained under this Code section shall not be subject to replevin but is deemed to be in the custody of the superior court wherein the seizure was made or in custody of the superior court where it can be proven that the burglary or armed robbery was committed, subject only to the orders and decrees of the court having jurisdiction over the forfeiture proceedings. When property is seized under this chapter, law enforcement officers seizing such property shall:

(1) Place the property under seal;

(2) Remove the property to a place designated by the judge of the superior court having jurisdiction over the forfeiture as set out in this subsection; or

(3) Deliver such property to the sheriff or police chief of the county in which the seizure occurred, and the sheriff or police chief shall take custody of the property and remove it to an appropriate location for disposition in accordance with law.

(d) When property is seized under this chapter, the sheriff or law enforcement officer seizing the same shall report the fact of seizure, within 20 days thereof, to the district attorney of the judicial circuit having jurisdiction in the county where the seizure was made. Within 60 days from the date he or she receives notice of the seizure, the district attorney of the judicial circuit shall cause to be filed in the superior court of the county in which the property is seized or detained an in rem complaint for forfeiture of such property as provided for in this Code section. The proceedings shall be brought in the name of the state by the district attorney of the circuit in which the property was seized, and the complaint shall be verified by a duly authorized agent of

the state in a manner required by the law of this state. The complaint shall describe the property, state its location, state its present custodian, state the name of the owner, if known to the duly authorized agent of the state, allege the essential elements of the violation upon which the forfeiture is based, and shall conclude with a prayer of due process to enforce the forfeiture. Upon the filing of such a complaint, the court shall promptly cause process to issue to the present custodian in possession of the property described in the complaint, commanding him or her to seize the property described in the complaint and to hold that property for further order of the court. A copy of the complaint shall be served on the owner or lessee, if known. A copy of the complaint shall also be served upon any person having a duly recorded security interest in or lien upon that property. If the owner or lessee is unknown or resides out of the state or departs the state or cannot after due diligence be found within the state or conceals himself or herself so as to avoid service, notice of the proceedings shall be published once a week for two weeks in the newspaper in which the sheriff's advertisements are published. Such publication shall be deemed notice to any and all persons having an interest in or right affected by such proceeding and from any sale of the property resulting therefrom but shall not constitute notice to any person having a duly recorded security interest in or lien upon such property and required to be served under this Code section unless that person is unknown or resides out of the state or departs the state or cannot after due diligence be found within the state or conceals himself or herself to avoid service. An owner of or interest holder in the property may file an answer asserting a claim against the property in the action in rem. Any such answer shall be filed within 30 days after the service of the summons and complaint. Where service is made by publication and personal service has not been made, an owner or interest holder shall file an answer within 30 days of the date of final publication. An answer must be verified by the owner or interest holder under penalty of perjury. In addition to complying with the general rules applicable to an answer in civil actions, the answer must set forth:

- (1) The caption of the proceedings as set forth in the complaint and the name of the claimant;
- (2) The address at which the claimant will accept mail;
- (3) The nature and extent of the claimant's interest in the property;
- (4) The date, identity of transferor, and circumstances of the claimant's acquisition of the interest in the property;
- (5) The specific provision of this Code section relied on in asserting that the property is not subject to forfeiture;
- (6) All essential facts supporting each assertion; and

(7) The precise relief sought.

If at the expiration of the period set forth in this subsection no answer has been filed, the court shall order the disposition of the seized property as provided for in this Code section. If an answer is filed, a hearing must be held within 60 days after service of the complaint unless continued for good cause and must be held by the court without a jury. If the court determines that a claimant defending the complaint knew or by the exercise of ordinary care should have known that the property was to be used for an unlawful purpose subjecting it to forfeiture under this chapter, the court shall order the disposition of the seized property as provided in this Code section and that claimant shall have no claim upon the property or proceeds from the sale thereof.

(e)(1) When property is forfeited under this chapter, the judge of the superior court in the county where the seizure was made or in the county in which it can be proven that the burglary or armed robbery was committed may dispose of the property by issuing an order to:

(A) Retain it for official use by any agency of this state or any political subdivision thereof;

(B) Sell that which is not required to be destroyed by law and which is not harmful to the public. The proceeds shall be used for payment of all proper expenses of the proceedings for forfeiture and sale, including but not limited to the expenses of seizure, maintenance of custody, advertising, and court costs; or

(C) Require the sheriff or police chief of the county in which the seizure occurred to take custody of the property and remove it for disposition in accordance with law.

(2)(A) Money, currency, or proceeds which are realized from the sale or disposition of forfeited property shall after satisfaction of the interest of secured parties and after payment of all costs vest in the local political subdivision whose law enforcement officers seized it. If the property was seized by a municipal law enforcement agency then the money, currency, or proceeds realized from the sale or disposition of the property shall vest in that municipality. If the property was seized by a county law enforcement agency, then the money, currency, or proceeds realized from the sale or disposition of the property shall vest in that county. If the property was seized by joint action of a county law enforcement agency and a municipal law enforcement agency, then the money, currency, or proceeds realized from the sale or disposition of the property shall vest in that county and that municipality and shall be divided equally between the county and municipality. If the property was seized by a state law enforcement agency, then the money, currency, or proceeds realized from the sale or disposition of the property shall

vest in the county where the condemnation proceedings are filed. Except as otherwise provided in subparagraph (B) of paragraph (1) of this subsection for payment of all costs, the local government in which the money, currency, or proceeds realized from the forfeited property vests shall expend or use such funds or proceeds received for any official law enforcement purpose except for the payment of salaries or rewards to law enforcement personnel, at the discretion of the chief officer of the local law enforcement agency, or to fund victim-witness assistance programs. Such property shall not be used to supplant any other local, state, or federal funds appropriated for staff or operations.

(B) Any local law enforcement agency receiving property under this subsection shall submit an annual report to the local governing authority. The report shall be submitted with the agency's budget request and shall itemize the property received during the fiscal year and the utilization made thereof. (Code 1981, § 16-16-2, enacted by Ga. L. 1995, p. 1051, § 4.)

JUDICIAL DECISIONS

Forfeiture order. — Forfeiture of a pickup truck and a trailer used to commit a burglary was upheld as the state's burden of proof was "by a preponderance of the evidence" and not "beyond a reasonable doubt" as alleged by the property owner; furthermore, the state was not required to prove a burglary conviction under O.C.G.A. § 16-7-1, or that charges

were even filed, and whether a burglary took place without the owner's knowledge or consent was a fact question to be resolved by the court, which as the trier of fact, was not obligated to believe a witness even if the testimony was uncontradicted. *Walker v. State of Ga.*, 281 Ga. App. 526, 636 S.E.2d 705 (2006).

CHAPTER 17

PAYDAY LENDING

Sec.		Sec.	
16-17-1.	"Payday lending" defined; legislative findings; prohibited activity; no impairment of agencies with concurrent jurisdiction.	16-17-5.	Tax on loans.
16-17-2.	Prohibition on loans of less than \$3,000.00; exceptions; penalty for violations.	16-17-6.	Evidence and investigation in pursuit of prosecutions.
16-17-3.	Collection of indebtedness barred; civil action permitted by borrowers.	16-17-7.	Prohibition against issuance of certificate of authority from Secretary of State.
16-17-4.	Liability for civil penalty to state; distribution of proceeds.	16-17-8.	Site of payday lending is public nuisance.
		16-17-9.	Special provisions for borrowers who are members of the military or their respective spouses.
		16-17-10.	Severability.

Law reviews. — For article on 2004 enactment of this chapter, see 21 Georgia St. U.L. Rev. 59 (2004).

RESEARCH REFERENCES

Am. Jur. 2d. — 53A Am. Jur. 2d, Moneylenders and Pawnbrokers, § 1 et seq.

16-17-1. "Payday lending" defined; legislative findings; prohibited activity; no impairment of agencies with concurrent jurisdiction.

(a) Without limiting in any manner the scope of this chapter, "payday lending" as used in this chapter encompasses all transactions in which funds are advanced to be repaid at a later date, notwithstanding the fact that the transaction contains one or more other elements and a "payday lender" shall be one who engages in such transactions. This definition of "payday lending" expressly incorporates the exceptions and examples contained in subsections (a) and (b) of Code Section 16-17-2.

(b) Despite the fact that the Attorney General of the State of Georgia has opined in Official Opinion 2002-3 entered on June 27, 2002, that payday lending is in violation of Georgia law and despite the fact that the Industrial Loan Commissioner has issued cease and desist orders against various payday lenders in the State of Georgia, the General Assembly has determined that payday lending continues in the State of Georgia and that there are not sufficient deterrents in the State of Georgia to cause this illegal activity to cease.

(c) The General Assembly has determined that various payday lenders have created certain schemes and methods in order to attempt to disguise these transactions or to cause these transactions to appear to be “loans” made by a national or state bank chartered in another state in which this type of lending is unregulated, even though the majority of the revenues in this lending method are paid to the payday lender. The General Assembly has further determined that payday lending, despite the illegality of such activity, continues to grow in the State of Georgia and is having an adverse effect upon military personnel, the elderly, the economically disadvantaged, and other citizens of the State of Georgia. The General Assembly has further determined that substantial criminal and civil penalties over and above those currently existing under state law are necessary in order to prohibit this activity in the State of Georgia and to cause the cessation of this activity once and for all. The General Assembly further declares that these types of loans are currently illegal and are in violation of Code Section 7-4-2. The General Assembly declares that the use of agency or partnership agreements between in-state entities and out-of-state banks, whereby the in-state agent holds a predominant economic interest in the revenues generated by payday loans made to Georgia residents, is a scheme or contrivance by which the agent seeks to circumvent Chapter 3 of Title 7, the “Georgia Industrial Loan Act,” and the usury statutes of this state.

(d) Payday lending involves relatively small loans and does not encompass loans that involve interstate commerce. Certain payday lenders have attempted to use forum selection clauses contained in payday loan documents in order to avoid the courts of the State of Georgia, and the General Assembly has determined that such practices are unconscionable and should be prohibited.

(e) Without limiting in any manner the scope of this chapter, the General Assembly declares that it is the general intent of this chapter to reiterate that in the State of Georgia the practice of engaging in activities commonly referred to as payday lending, deferred presentment services, or advance cash services and other similar activities are currently illegal and to strengthen the penalties for those engaging in such activities.

(f) This chapter in no way impairs or restricts the authority granted to the commissioner of banking and finance, the Industrial Loan Commissioner, or any other regulatory authority with concurrent jurisdiction over the matters stated in this chapter. (Code 1981, § 16-17-1, enacted by Ga. L. 2004, p. 60, § 3; Ga. L. 2005, p. 60, § 16/HB 95.)

Law reviews. — For annual survey of law of business associations, see 56 *Mercer L. Rev.* 77 (2004).

JUDICIAL DECISIONS

Enforcement. — Request by creditors for a preliminary injunction blocking the enforcement of O.C.G.A. § 16-17-1 et seq., which prohibited payday loans, was moot because the creditors were no longer offering those loans; thus, the creditors no longer had a legally cognizable interest in obtaining the injunction and there was no longer an actual adversarial context for a ruling. *BankWest, Inc. v. Baker*, 446 F.3d 1358 (11th Cir. 2006).

Constitutionality. — Trial court did not err in rejecting both the defendants' equal protection and vagueness challenges to O.C.G.A. § 16-17-1 et seq., after the defendants were charged with violating O.C.G.A. § 16-17-2, as both the defendants, as in-state lenders, were not similarly situated with out-of-state banks designated in O.C.G.A. § 16-17-2(a)(3), and hence were subject to state regulation restricting high interest rates on loans, whereas the out-of-state banks were not; the Georgia legislature had a rational basis for creating a class based on those in-state payday lenders who were subject to state regulation, and moreover the prohibition against payday loans in whatever form transacted was sufficiently definite to satisfy due process standards. *Glenn v. State*, 282 Ga. 27, 644 S.E.2d 826 (2007).

Legality of payday lending contracts was issue for arbitrator. — Borrower's argument that the payday lending contracts that the borrower entered into were illegal and void ab initio under Georgia law, O.C.G.A. § 16-17-1, challenged the content of these contracts and not their existence and was an issue for an

arbitrator, not the court, to decide. *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868 (11th Cir. 2005), cert. denied, 546 U.S. 1214, 126 S. Ct. 1457, 164 L. Ed. 2d 132 (2006).

Sale/leaseback transactions deemed illegal payday loans. — Sale/leaseback transactions engaged in by consumer cash advance businesses violated the anti-payday lending statute, O.C.G.A. § 16-17-1 et seq., and the Georgia Industrial Loan Act, O.C.G.A. § 7-3-1 et seq., since the state proved that the purported lease back of personal property to the consumer was not based on the actual appraised market value of the personal property but directly corresponded to the loan amount; the state proved that the businesses were requiring customers to be released from the loan agreement by paying the principal amount advanced to them plus a 25 to 27 percent fee, which amounted to an annual percentage rate of 650 to 702 percent. *Clay v. Oxendine*, 285 Ga. App. 50, 645 S.E.2d 553 (2007), cert. denied, 2007 Ga. LEXIS 556 (Ga. 2007).

Prospective operation. — Request by creditors for a preliminary injunction blocking the enforcement of O.C.G.A. § 16-17-1 et seq., (the Act), which prohibited payday loans, did not address a case or controversy because the Act did not apply retroactively to loans made before the effective date of the Act; even if the Georgia Attorney General had not explicitly conceded this point, O.C.G.A. § 1-3-5 prohibited the retroactive application to impair the obligation of existing contracts. *BankWest, Inc. v. Baker*, 446 F.3d 1358 (11th Cir. 2006).

RESEARCH REFERENCES

ALR. — State regulation of payday loans, 29 ALR6th 461.

16-17-2. Prohibition on loans of less than \$3,000.00; exceptions; penalty for violations.

(a) It shall be unlawful for any person to engage in any business, in whatever form transacted, including, but not limited to, by mail, electronic means, the Internet, or telephonic means, which consists in whole or in part of making, offering, arranging, or acting as an agent in the making of loans of \$3,000.00 or less unless:

(1) Such person is engaging in financial transactions permitted pursuant to:

(A) The laws regulating financial institutions as defined under Chapter 1 of Title 7, the "Financial Institutions Code of Georgia";

(B) The laws regulating state and federally chartered credit unions;

(C) Article 13 of Chapter 1 of Title 7, relating to Georgia residential mortgages;

(D) Chapter 3 of Title 7, the "Georgia Industrial Loan Act";

(E) Chapter 4 of Title 7, relating to interest and usury;

(F) Chapter 5 of Title 7, "The Credit Card and Credit Card Bank Act," including financial institutions and their assignees who are not operating in violation of said chapter; or

(G) Paragraph (2) of subsection (a) of Code Section 7-4-2 in which the simple interest rate is not greater than 16 percent per annum;

(2) Such loans are lawful under the terms of:

(A) Article 1 of Chapter 1 of Title 10, "The Retail Installment and Home Solicitation Sales Act";

(B) Article 2 of Chapter 1 of Title 10, the "Motor Vehicle Sales Finance Act"; or

(C) Part 5 of Article 3 of Chapter 12 of Title 44, relating to pawnbrokers;

(3) Subject to the provisions of paragraph (4) of subsection (b) of this Code section, such person is a bank or thrift chartered under the laws of the United States, a bank chartered under the laws of another state and insured by the Federal Deposit Insurance Corporation, or a credit card bank and is not operating in violation of the federal and state laws applicable to its charter; or

(4) Such loan is made as a tax refund anticipation loan. In order to be exempt under this paragraph the tax refund anticipation loan

must be issued using a borrower's filed tax return and the loan cannot be for more than the amount of the borrower's anticipated tax refund. Tax returns that are prepared but not filed with the proper government agency will not qualify for a loan exemption under this paragraph.

(b) Subject to the exceptions in subsection (a) of this Code section, this Code section shall apply with respect to all transactions in which funds are advanced to be repaid at a later date, notwithstanding the fact that the transaction contains one or more other elements. Without limiting the generality of the foregoing, the advance of funds to be repaid at a later date shall be subject to this Code section, notwithstanding the fact that the transaction also involves:

(1) The cashing or deferred presentment of a check or other instrument;

(2) The selling or providing of an item, service, or commodity incidental to the advance of funds;

(3) Any other element introduced to disguise the true nature of the transaction as an extension of credit; or

(4) Any arrangement by which a de facto lender purports to act as the agent for an exempt entity. A purported agent shall be considered a de facto lender if the entire circumstances of the transaction show that the purported agent holds, acquires, or maintains a predominant economic interest in the revenues generated by the loan.

(c)(1) A payday lender shall not include in any loan contract made with a resident of this state any provision by which the laws of a state other than Georgia shall govern the terms and enforcement of the contract, nor shall the loan contract designate a court for the resolution of disputes concerning the contract other than a court of competent jurisdiction in and for the county in which the borrower resides or the loan office is located.

(2) An arbitration clause in a payday loan contract shall not be enforceable if the contract is unconscionable. In determining whether the contract is unconscionable, the court shall consider the circumstances of the transaction as a whole, including but not limited to:

(A) The relative bargaining power of the parties;

(B) Whether arbitration would be prohibitively expensive to the borrower in view of the amounts in controversy;

(C) Whether the contract restricts or excludes damages or remedies that would be available to the borrower in court, including the right to participate in a class action;

(D) Whether the arbitration would take place outside the county in which the loan office is located or any other place that would be unduly inconvenient or expensive in view of the amounts in controversy; and

(E) Any other circumstance that might render the contract oppressive.

(d) Any person who violates subsection (a) or (b) of this Code section shall be guilty of a misdemeanor of a high and aggravated nature and upon conviction thereof shall be punished by imprisonment for not more than one year or by a fine not to exceed \$5,000.00 or both. Each loan transaction shall be deemed a separate violation of this Code section. Any person who aids or abets such a violation, including any arbiter or arbitration company, shall likewise be guilty of a misdemeanor of a high and aggravated nature and shall be punished as set forth in this subsection. If a person has been convicted of violations of subsection (a) or (b) of this Code section on three prior occasions, then all subsequent convictions shall be considered felonies punishable by a fine of \$10,000.00 or five years' imprisonment or both. (Code 1981, § 16-17-2, enacted by Ga. L. 2004, p. 60, § 3; Ga. L. 2005, p. 60, § 16/HB 95.)

Law reviews. — For annual survey of law of business associations, see 56 Mercer L. Rev. 77 (2004).

JUDICIAL DECISIONS

Constitutionality. — Trial court did not err in rejecting both the defendants' equal protection and vagueness challenges to O.C.G.A. § 16-17-1 et seq., after the defendants were charged with violating O.C.G.A. § 16-17-2, as both the defendants, as in-state lenders, were not similarly situated with out-of-state banks designated in O.C.G.A. § 16-17-2(a)(3), and hence were subject to state regulation restricting high interest rates on loans, whereas the out-of-state banks were not; the Georgia legislature had a rational basis for creating a class based on those in-state payday lenders who were subject to state regulation, and moreover the prohibition against payday loans in whatever form transacted was sufficiently definite to satisfy due process standards. *Glenn v. State*, 282 Ga. 27, 644 S.E.2d 826 (2007).

Sale/leaseback transactions deemed

illegal payday loans. — Sale/leaseback transactions engaged in by consumer cash advance businesses violated the anti-payday lending statute, O.C.G.A. § 16-17-1 et seq., and the Georgia Industrial Loan Act, O.C.G.A. § 7-3-1 et seq., since the state proved that the purported lease back of personal property to the consumer was not based on the actual appraised market value of the personal property but directly corresponded to the loan amount; the state proved that the businesses were requiring customers to be released from the loan agreement by paying the principal amount advanced to the customers plus a 25 to 27 percent fee, which amounted to an annual percentage rate of 650 to 702 percent. *Clay v. Oxendine*, 285 Ga. App. 50, 645 S.E.2d 553 (2007), cert. denied, 2007 Ga. LEXIS 556 (Ga. 2007).

16-17-3. Collection of indebtedness barred; civil action permitted by borrowers.

Any person who violates subsection (a) or (b) of Code Section 16-17-2 shall be barred from the collection of any indebtedness created by said loan transaction and said transaction shall be void ab initio, and any person violating the provisions of subsection (a) or (b) of Code Section 16-17-2 shall in addition be liable to the borrower in each unlawful transaction for three times the amount of any interest or other charges to the borrower. A civil action under Code Section 16-17-2 may be brought on behalf of an individual borrower or on behalf of an ascertainable class of borrowers. In a successful action to enforce the provisions of this chapter, a court shall award a borrower, or class of borrowers, costs including reasonable attorneys' fees. (Code 1981, § 16-17-3, enacted by Ga. L. 2004, p. 60, § 3.)

16-17-4. Liability for civil penalty to state; distribution of proceeds.

(a) Any person who violates subsection (a) or (b) of Code Section 16-17-2 shall be liable to the state for a civil penalty equal to three times the amount of any interest or charges to the borrowers in the unlawful transactions.

(b) A civil action under Code Section 16-17-2 may be brought by the Attorney General, any district attorney, or a private party. Where a successful civil action is brought by a district attorney, one-half of the damages recovered on behalf of the state shall be distributed to the office of the district attorney of the judicial circuit of such district attorney to be used by the district attorney in order to fund the budget of that office. (Code 1981, § 16-17-4, enacted by Ga. L. 2004, p. 60, § 3; Ga. L. 2005, p. 60, § 16/HB 95.)

16-17-5. Tax on loans.

(a) There is imposed a state tax on all loans made in violation of this chapter. Such tax shall be administered and collected in connection with the Georgia income taxation of the person making such loans and shall be in addition to any other tax liability of such person.

(b) The tax imposed by this Code section shall be at the rate of 50 percent of all proceeds received by a person from loans made in violation of this chapter.

(c) A person making loans in violation of this chapter shall declare and return the proceeds subject to taxation under this Code section as a part of such person's Georgia income tax return.

(d) The state revenue commissioner shall retain returns under this Code section apart from all other returns and shall not disclose any part of such a return for any purpose other than the collection of tax owed or a criminal prosecution involving tax matters. In a criminal proceeding under this chapter, a person's return of proceeds under this Code section and any evidence derived as a result of such return shall not be admissible. (Code 1981, § 16-17-5, enacted by Ga. L. 2004, p. 60, § 3.)

16-17-6. Evidence and investigation in pursuit of prosecutions.

In regard to any loan transaction that is alleged to be in violation of subsection (a) of Code Section 16-17-2, the trial court shall be authorized to review the terms of the transaction in their entirety in order to determine if there has been any contrivance, device, or scheme used by the lender in order to avoid the provisions of subsection (a) of Code Section 16-17-2. The trial court shall not be bound in making such determination by the parol evidence rule or by any written contract but shall be authorized to determine exactly whether the loan transaction includes the use of a scheme, device, or contrivance and whether in reality the loan is in violation of the provisions of subsection (a) of Code Section 16-17-2 based upon the facts and evidence relating to that transaction and similar transactions being made in the State of Georgia. If any entity involved in soliciting or facilitating the making of payday loans purports to be acting as an agent of a bank or thrift, then the court shall be authorized to determine whether the entity claiming to act as agent is in fact the lender. Such entity shall be presumed to be the lender if, under the totality of the circumstances, it holds, acquires, or maintains a predominant economic interest in the revenues generated by the loan. Furthermore, the trial court shall further be authorized to investigate all transactions involving gift cards, telephone cards, the sale of goods or services, computer services, or the like which may be tied to such loan transactions and are an integral part thereof in order to determine whether any such transaction is in fact a contrivance, scheme, or device used by the payday lender in order to evade the provisions of subsection (a) of Code Section 16-17-2. (Code 1981, § 16-17-6, enacted by Ga. L. 2004, p. 60, § 3.)

JUDICIAL DECISIONS

Sale/leaseback transactions deemed illegal payday loans. — Sale/leaseback transactions engaged in by consumer cash advance businesses violated the anti-payday lending statute, O.C.G.A. § 16-17-1 et seq., and the Georgia Industrial Loan Act, O.C.G.A. § 7-3-1 et seq., since the state proved that the purported lease back of personal property to the

consumer was not based on the actual appraised market value of the personal property but directly corresponded to the loan amount; the state proved that the businesses were requiring customers to be released from the loan agreement by paying the principal amount advanced to the customers plus a 25 to 27 percent fee, which amounted to an annual percentage

rate of 650 to 702 percent. Clay v. 553 (2007), cert. denied, 2007 Ga. LEXIS Oxendine, 285 Ga. App. 50, 645 S.E.2d 556 (Ga. 2007).

16-17-7. Prohibition against issuance of certificate of authority from Secretary of State.

All corporations, limited liability companies, and other business entities which are engaged in payday lending in the State of Georgia are prohibited from obtaining any certificate of authority from the Secretary of State or from the Department of Banking and Finance, and engaging in such payday lending activity in the State of Georgia shall result in the revocation of any existing certificate of authority. (Code 1981, § 16-17-7, enacted by Ga. L. 2004, p. 60, § 3; Ga. L. 2005, p. 60, § 16/HB 95.)

16-17-8. Site of payday lending is public nuisance.

The site or location of a place of business where payday lending takes place in the State of Georgia is declared a public nuisance. (Code 1981, § 16-17-8, enacted by Ga. L. 2004, p. 60, § 3.)

16-17-9. Special provisions for borrowers who are members of the military or their respective spouses.

(a) In addition to the other obligations and duties required under this chapter, if the customer is a member of the military services of the United States or a spouse of a member of the military services of the United States, the following duties and obligations apply to any payday lender:

(1) The lender is prohibited from garnishment of any military wages or salaries;

(2) The lender is prohibited from conducting any collection activity against a military customer or his or her spouse when the military member has been deployed to a combat or combat support posting for the duration of the deployment;

(3) The lender is prohibited from contacting the commanding officer of a military customer in an effort to collect on a loan to the military member or his or her spouse;

(4) The lender agrees to be bound by the terms of any repayment agreement that it negotiates through military counselors or third-party credit counselors; and

(5) The lender agrees to honor any statement or proclamation by a military base commander that a specific payday lender branch

location has been declared off limits to military personnel and their spouses.

(b) If the customer is a member of the military services of the United States or a spouse of a member of the military services of the United States, the following disclosures shall be made in writing by the payday lender:

(1) A notice that the lender is prohibited from garnishment of any military wages or salaries;

(2) A notice that the lender is prohibited from conducting any collection activity against a military customer or his or her spouse when the military member has been deployed to a combat or combat support posting for the duration of the deployment;

(3) A notice that the lender is prohibited from contacting the commanding officer of a military customer in an effort to collect on a loan to the military member or his or her spouse;

(4) A notice that the lender agrees to be bound by the terms of any repayment agreement that it negotiates through military counselors or third-party credit counselors; and

(5) A notice that the lender agrees to honor any statement or proclamation by a military base commander that a specific payday lending branch location has been declared off limits to military personnel and their spouses. (Code 1981, § 16-17-9, enacted by Ga. L. 2004, p. 60, § 3.)

16-17-10. Severability.

If any provision of this chapter or the application of such provision is found by a court of competent jurisdiction in the United States to be invalid or is found to be superseded by federal law, then the remaining provisions of this chapter shall not be affected, and this chapter shall continue to apply to any other person or circumstance. (Code 1981, § 16-17-10, enacted by Ga. L. 2004, p. 60, § 3.)

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- Immunity from prosecution, §16-3-24.2.

DEFENSES —Cont'd

Self-defense —Cont'd

- Machine guns, sawed-off shotguns, sawed-off rifles or firearms with silencers used in committing certain offenses.
- Enhanced criminal penalty.
- Exemption for use of force in defense of others, §16-11-162.
- No duty to retreat, §16-3-23.1.

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Acquirer.

- Illegal use of financial transaction cards, §16-9-30.

Actor.

- Sexual assault by person in disciplinary or supervisory position of authority, §16-6-5.1.

Addiction.

- Controlled substances, §16-13-21.

Administer.

- Controlled substances, §16-13-21.

Administrators.

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Affirmative defense.

Criminal code, §16-1-3.

Agencies.

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Criminal code, §16-1-3.

Agent.

Controlled substances, §16-13-21.

Alien corporation.

Racketeer influenced and corrupt organizations, §16-14-3.

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Criminal law and procedure, §16-11-111.

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Cruelty to animals, §16-12-4.

Another.

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Theft by deception, §16-8-3.

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Theft of trade secrets, §16-8-13.

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Authorized user.

Computer security act of 2005, §16-9-151.

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Illegal use of financial transaction cards, §16-9-30.

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Automatic technical process.

Spam e-mail, §16-9-100.

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Bombs, explosives and chemical or biological weapons, §16-7-80.

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Gambling, §16-12-20.

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DEFINED TERMS —Cont'd

Biological weapon.

Bombs, explosives and chemical or biological weapons, §16-7-80.

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Bureau.

Controlled substances, §16-13-21.

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Forfeiture of property from crimes, §16-16-1.

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Business victim.

Identity fraud, §16-9-120.

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Call.

Unlawful conduct during 9-1-1 call, §16-11-39.2.

Cardholder.

Illegal use of financial transaction cards, §16-9-30.

Carnal knowledge.

Rape, §16-6-1.

Cause to be copied.

Computer security act of 2005, §16-9-151.

CD-ROM.

Electronically furnishing obscene material, §16-12-100.1.

Center.

Firearms transfers or purchases subject to NICS, §16-11-171.

Charter.

Transportation passenger safety, §16-12-122.

Chemical substance.

Methamphetamine, §16-5-73.

Chief administrative officer.

Unit of university system, §16-11-35.

Child.

Computer pornography and child exploitation, §16-12-100.2.

Custodial interference, §16-5-45.

DEFINED TERMS —Cont'd

Child —Cont'd

Methamphetamine, §16-5-73.

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Cigarette.

Sales, possession, etc., by minors,
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Racketeer influenced and corrupt
organizations, §16-14-3.

Coercion.

Defense to sexual crimes committed
while person being trafficked for
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Trafficking of persons for labor or
sexual servitude, §16-5-46.

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Spam e-mail, §16-9-100.

Commercial purpose.

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Custodial interference, §16-5-45.

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Use in committing or facilitating
controlled substances felonies,
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related objects by minors,
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Company.

Transportation passenger safety,
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Pyramid promotional schemes,
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Criminal offenses, §16-9-92.

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Criminal offenses, §16-9-92.

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Criminal offenses, §16-9-92.

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Criminal offenses, §16-9-92.

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Computer security act of 2005,
§16-9-151.

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Computer security act of 2005,
§16-9-151.

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Pyramid promotional schemes,
§16-12-38.

Consumer.

Computer security act of 2005,
§16-9-151.

DEFINED TERMS —Cont'd

Consumer victim.

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16-13-21.

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Sanctions against licensed persons for
certain violations, §16-13-110.

Conveyance.

Controlled substances, §16-13-21.

Convicted.

Carrying concealed weapon, license,
§16-11-129.

Controlled substances, §16-13-110.

Conviction.

Bombs, explosives and chemical or
biological weapons, §16-7-80.

Controlled substances, §16-13-110.

Criminal code, §16-1-3.

Cruelty to animals, §16-12-4.

Deposit account fraud, §16-9-20.

Gambling, §16-12-24.

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Theft of trade secrets, §16-8-13.

Correctional officer.

Aggravated assault, §16-5-21.

Aggravated battery, §16-5-24.

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Pandering.

Forfeiture of vehicle, §16-6-13.2.

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Court costs.

Pandering.

Forfeiture of vehicle, §16-6-13.2.

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Credit repair services organization.

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Crime.

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Criminal negligence.

Criminal code, §16-2-1.

Criminal proceeding.

Racketeer influenced and corrupt
organizations, §16-14-3.

Criminal street gangs, §16-15-3.

Damages.

Computer security act of 2005,
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DEFINED TERMS —Cont'd

Dangerous drug, §§16-13-1, 16-13-21, 16-13-71.

Carrying concealed weapon, license, §16-11-129.

Dangerous weapon, §16-11-121.

Data.

Criminal offenses, §16-9-92.

DEA.

Controlled substances, §16-13-21.

Dealer.

Firearms transfers or purchases subject to NICS, §16-11-171.

Deceitful means.

Theft by deception, §16-8-3.

Deception.

Defense to sexual crimes committed while person being trafficked for sexual servitude, §16-3-6.

Trafficking of persons for labor or sexual servitude, §16-5-46.

Delinquent act.

Contributing to delinquency, etc., of minor, §16-12-1.

Deliver.

Controlled substances, §16-13-21.

Delivery.

Controlled substances, §16-13-21.

Dependency.

Controlled substances, §16-13-21.

Dependent.

Controlled substances, §16-13-21.

Deprive.

Theft, §16-8-1.

Destructive device.

Bombs, explosives and chemical or biological weapons, §16-7-80.

Theft, §16-8-12.

Transmitting false public alarm, §16-10-28.

Detonator.

Bombs, explosives and chemical or biological weapons, §16-7-80.

Devices.

Criminal invasions of privacy, §16-11-60.

Direct consent.

Spam e-mail, §16-9-100.

Dispense.

Controlled substances, §16-13-21.

Dispenser.

Controlled substances, §16-13-21.

Distribute.

Bombs, explosives and chemical or biological weapons, §16-7-80.

DEFINED TERMS —Cont'd

Distribute —Cont'd

Controlled substances, §16-13-21.

Distributor.

Controlled substances, §16-13-21.

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Racketeer influenced and corrupt organizations, §16-14-3.

Dog.

Dogfighting, §16-12-37.

Domain.

Spam e-mail, §16-9-100.

Domain owner.

Spam e-mail, §16-9-100.

Domestic terrorism, §16-4-10.

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Dump.

Waste control law, §16-7-51.

Eavesdropping device.

Criminal invasion of privacy, §16-11-63.

Egregious litter.

Waste control law, §16-7-51.

Electronically furnishes.

Electronically furnishing obscene material, §16-12-100.1.

Electronic cash register.

Sales suppression devices, §16-9-62.

Electronic communication.

Computer offenses, §16-9-92.

Electronic communication service.

Computer offenses, §16-9-92.

Electronic communications system.

Computer offenses, §16-9-92.

Electronic device.

Computer pornography and child exploitation, §16-12-100.2.

Electronic means.

Computer offenses, §16-9-92.

Electronic monitoring device.

Home arrest program, §16-7-29.

Electronic storage.

Computer offenses, §16-9-92.

E-mail.

Spam e-mail, §16-9-100.

E-mail address.

Spam e-mail, §16-9-100.

E-mail message.

Use of Internet or e-mail to induce person to provide personal information by posing as a business, §16-9-109.1.

E-mail service provider.

Spam e-mail, §16-9-100.

DEFINED TERMS —Cont'd

Emergency medical professional.
Obstructing or hindering, §16-10-24.2.

Emergency medical technician.
Criminal obstruction or hindering,
§16-10-24.2.

Employees.
Computer security act of 2005,
§16-9-156.

Employer.
Use of Internet or e-mail to induce
person to provide personal
information by posing as a
business, §16-9-109.1.

End user.
Telephone records privacy protection,
§16-11-70.

Enterprise.
Racketeer influenced and corrupt
organizations, §16-14-3.

EOD technician.
Bombs, explosives and chemical or
biological weapons, §16-7-80.

Execute.
Computer security act of 2005,
§16-9-151.

Expired financial transaction card,
§16-9-30.

**Explosive ordinance disposal
technician.**
Bombs, explosives and chemical or
biological weapons, §16-7-80.

Explosives.
Bombs, explosives and chemical or
biological weapons, §16-7-80.
Theft, §16-8-12.

Express malice.
Murder, §16-5-1.

Extension of credit.
Operation of credit repair services
organization, §16-9-59.

Facility.
Film piracy, §16-8-62.
Group care facility operators,
§16-12-1.1.

False or misleading.
Spam e-mail, §16-9-100.

False or secret compartment.
Vehicles with, §16-11-112.

False report.
Unlawful conduct during 9-1-1 call,
§16-11-39.2.

FDA.
Controlled substances, §16-13-21.

Felony.
Bombs, explosives and chemical or
biological weapons, §16-7-80.

DEFINED TERMS —Cont'd

Felony —Cont'd
Contributing to delinquency, etc., of
minor, §16-12-1.

Criminal code, §16-1-3.
Possession of firearms by convicted
felons and first offender
probationers, §16-11-131.

Three time loser statute, §16-11-133.

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Partial-birth abortions, §16-12-144.

Financial institutions.
Deposit account fraud, §16-9-20.
Theft, §16-8-1.

Financial instruments.
Computer related offenses, §16-9-92.

Financial loss.
Chop shops, §16-8-83.

Financial transaction card, §16-9-30.
**Financial transaction card account
number.**

Illegal use of financial transaction
card, §16-9-30.

Firearm.
Firearms transfers or purchases
subject to NICS, §16-11-171.
Hijacking motor vehicle, §16-5-44.1.
Possession by convicted felons and
first offender probationers,
§16-11-131.
Possession during commission of or
attempt to commit certain crimes,
§16-11-106.
Theft, §16-8-12.
Theft of weapon from peace officer,
correction officer, etc., §16-10-33.
Theft penalties, §16-8-12.
Three time loser statute, §16-11-133.

Firearms detection dog.
Destroying or injuring, §16-11-107.

Firefighters.
Criminal obstruction or hindering,
§16-10-24.1.

Fire service.
False representation as representative
of fire service organization,
§16-9-57.

Forcible felony.
Criminal code, §16-1-3.

Forcible misdemeanor.
Criminal code, §16-1-3.

Foreclosure fraud, §16-9-60.

Foreign government.
Sedition and subversive activities,
§16-11-6.

DEFINED TERMS —Cont'd

Foreign object.

Aggravated sexual battery, §16-6-22.2.

Foreign subversive organizations.

Sedition and subversive activities,
§16-11-6.

FTC.

Illegal use of financial transaction
cards, §16-9-30.

Gambling device, §16-12-20.

Gambling place, §16-12-20.

Government.

Criminal code, §16-1-3.

Governmental agency.

Pandering.

Forfeiture of vehicle, §16-6-13.2.

Habitation.

Defense of habitation, §16-3-24.1.

Handgun.

Carrying and possession of weapons,
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Harass.

Guide dogs and hearing dogs,
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Unlawful conduct during 9-1-1 call,
§16-11-39.2.

Harassing.

Unlawful conduct during 9-1-1 call,
§16-11-39.2.

Harbor.

Concealing, harboring or shielding
illegal alien from detection,
§16-11-201.

Harboring.

Concealing, harboring or shielding
illegal alien from detection,
§16-11-201.

Harmful to minors.

Electronically furnishing obscene
material, §16-12-100.1.
Sale, distribution, etc., of harmful
materials to minors, §16-12-102.

Hazardous substance.

Transmitting false public alarm,
§16-10-28.

Waste control law, §16-7-51.

Hazardous waste.

Waste control law, §16-7-51.

Haze, §16-5-61.

Header information.

Spam e-mail, §16-9-100.

Hoax device.

Bombs, explosives and chemical or
biological weapons, §16-7-80.

Household garbage.

Littering control law, §16-7-47.

DEFINED TERMS —Cont'd

Identifiable child.

Computer pornography and child
exploitation, §16-12-100.2.

Identification document.

Forgery, §16-9-4.

Identifying information.

Identity fraud, §16-9-120.

Use of Internet or e-mail to induce
person to provide personal
information by posing as a
business, §16-9-109.1.

Illegal alien.

Concealing, harboring or shielding
illegal alien from detection,
§16-11-201.

Inducing illegal alien to enter into
state, §16-11-202.

Transporting or moving illegal alien
for purpose of furthering illegal
presence, §16-11-200.

**Imitation controlled substance,
§16-13-21.**

Immediate precursor.

Controlled substances, §16-13-21.

Incendiary.

Bombs, explosives and chemical or
biological weapons, §16-7-80.

Incident.

Spam e-mail, §16-9-100.

Initiate.

Spam e-mail, §16-9-100.

Initiator.

Spam e-mail, §16-9-100.

Institution.

Remote dispensing of prescription
drugs, §16-13-41.

Instrument.

Deposit account fraud, §16-9-20.

**Intentionally and actively assisting
suicide, §16-5-5.**

Intentionally deceptive.

Computer security act of 2005,
§16-9-151.

Intent to manufacture.

Methamphetamine, §16-5-73.

Interest holder.

Pandering.

Forfeiture of vehicle, §16-6-13.2.

Internet.

Computer security act of 2005,
§16-9-151.

Use of Internet or e-mail to induce
person to provide personal
information by posing as a
business, §16-9-109.1.

DEFINED TERMS —Cont'd

Intimate parts.

- Sexual assault by person in disciplinary or supervisory position of authority, §16-6-5.1.
- Sexual battery, §16-6-22.1.

Inventory.

- Pyramid promotional schemes, §16-12-38.

Inventory loading.

- Pyramid promotional schemes, §16-12-38.

Investigative agency.

- Racketeer influenced and corrupt organizations, §16-14-3.

Involuntarily hospitalized.

- Firearms transfers or purchases subject to NICS, §16-11-171.

Isomers.

- Controlled substances, §16-13-21.

Issuer.

- Illegal use of financial transaction cards, §16-9-30.

Knife.

- Carrying and possession of weapons, §16-11-125.1.

Knowing.

- Drug related objects, §16-13-32.

Knowingly.

- Controlled substances, §16-13-1.
- Materials harmful to minors, §16-12-102.

Labor servitude.

- Trafficking of persons for labor or sexual servitude, §16-5-46.

Law enforcement unit.

- Computer offenses, §16-9-92.
- Harboring or aiding sexually violent offender not in compliance with registration requirement, §16-6-25.

Lawful custody.

- Custodial interference, §16-5-45.

Lawful owner.

- Chop shops, §16-8-83.

License.

- Carrying and possession of weapons, §16-11-125.1.

Licensed individual.

- Controlled substances, §16-13-110.

Licensed occupation.

- Controlled substances, §16-13-110.

License holder.

- Carrying and possession of weapons, §16-11-125.1.

DEFINED TERMS —Cont'd

Licensing authority.

- Controlled substances.
- Sanctions against licensed persons for certain violations, §16-13-110.

Litter, §16-7-42.

Livestock.

- Theft, §16-8-20.

Long gun.

- Carrying and possession of weapons, §16-11-125.1.

Lottery, §16-12-20.

Machine gun, §16-11-121.

Manufacture.

- Controlled substances, §16-13-21.

Marijuana.

- Controlled substances, §16-13-21.
- Sanctions against licensed persons for certain violations, §16-13-110.

Masseur, §16-6-17.

Masseuse, §16-6-17.

Methamphetamine.

- Controlled substances, §16-5-73.

Minor.

- Contributing to delinquency, unruliness, etc., §16-12-1.
- Controlled substances, §16-13-1.
- Electronically furnishing obscene material, §16-12-100.1.
- Materials harmful to minors, §16-12-102.
- Sale, possession, etc., of tobacco related objects by minors, §16-12-170.
- Sexual exploitation of children, §16-12-100.
- Spam e-mail, §16-9-100.
- Weapons.
- Furnishing handgun to minor, §16-11-101.1.

Misdemeanor.

- Criminal code, §16-1-3.

Misdemeanor of a high and aggravated nature.

- Criminal code, §16-1-3.

Model glue.

- Controlled substances, §16-13-90.

Mortgage lending process.

- Residential mortgage fraud, §16-8-101.

Motor vehicle.

- Chop shop, §16-8-82.
- Hijacking motor vehicle, §16-5-44.1.
- Pandering.
- Forfeiture of vehicle, §16-6-13.2.

DEFINED TERMS —Cont'd

Motor vehicle —Cont'd

Transporting or moving illegal alien for purpose of furthering illegal presence, §16-11-200.

Narcotic detection dog.

Destroying or injuring, §16-11-107.

Narcotic drug.

Controlled substances, §16-13-21.

Narcotics.

Destroying or injuring police dog or police horse, §16-11-107.

NICS.

Firearms transfers or purchases subject to NICS, §16-11-171.

9-1-1.

Unlawful conduct during 9-1-1 call, §16-11-39.2.

Noncontrolled substance, §16-13-21.

Nonprofit, tax-exempt organization.

Bingo, §16-12-51.

Raffles, §16-12-22.1.

Nudity.

Distribution of material depicting, §16-12-81.

Obscene material, §16-12-80.

Officer of the court.

Aggravated assault, §16-5-21.

Official proceedings.

Intimidation of witness, §16-10-32.

Official rating.

Offense of failure to display on video movies, §16-8-61.

Operate.

Bingo, §16-12-51.

Raffles, §16-12-22.1.

Operated.

Bingo, §16-12-51.

Operating.

Bingo, §16-12-51.

Operator.

Group care facility operators, §16-12-1.1.

Opiate.

Controlled substances, §16-13-21.

Opium poppy.

Controlled substances, §16-13-21.

Organization.

Advocating overthrow of government, §16-11-4.

Sedition and subversive activities, §16-11-6.

Over-pressure device.

Bombs, explosives and chemical or biological weapons, §16-7-80.

DEFINED TERMS —Cont'd

Owners.

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DISTRICT ATTORNEYS.

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